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PLEADINGS IN INDIA

WITH
PRECEDENTS

BY

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WITH AN INTRODUCTION

BY

The Chief Justice of Allahabad High Court

THIRD EDITION

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PREFACE TO THE FIRST EDITION

The need for improvement in the method of pleading in India has recently been emphasized by the Civil Justice Committee. In its report the Committee says :—

“ The main defects are prolixity, argumentativeness, a disclosure of immaterial facts, and a suppression of material facts which result in a failure to disclose the real nature of the case set up, and which provide an opportunity for a change of front..... There is no recognised authority in India from which a practitioner can obtain the assistance in preparing pleadings which an English lawyer enjoys. The framers of the Civil Procedure Code hoped that the use of the forms inserted in Appendix A (which under Order VI, rule 3, are directed to be used, wherever applicable, and followed, where not applicable) would afford sufficient guidance. The use of these forms is consistently neglected ; but, in any circumstances, those who have no other direction will not obtain satisfactory results from their study. The first requisite is to train pleaders to draft, and this training will be assisted appreciably by the preparation of a work on pleadings in India on the lines of Bullen and Leake.”

A.—I

This book was written before the publication of the Civil Justice Committee's report, and is not designed on the lines of Bullen and Leake. We have devoted relatively much more space to the principles of pleadings and to practical hints than to precedents; and we do not pretend to have supplied a precedent for every type of case in India : but the second part of the book includes pleadings based on the facts of Indian cases, as well as modifications of some of the precedents to be found in the appendix to the Code of Civil Procedure, and, in a few cases, in Bullen and Leake. We hope therefore that the book may, in some measure, supply the want indicated by the Civil Justice Committee.

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INTRODUCTION

The object of this book is to provide the practitioner and the student with an outline of the rules of pleading and with precedents of the more usual forms of actions. There is in this country a singular absence of text-books on this subject, due no doubt to the fact that the science of pleading has never been systematically taught. Indeed I am not going too far when I say, hardly taught at all. A failure to understand and apply the rules of pleading hampers a practitioner throughout his career. In England, it is the custom for a young barrister to read for one year in the chambers of a busy junior. In that year he sees all the instructions which come in for statements of claim, defences, counter-claims or replies. He tries his hand at drafting the required pleadings, and the man with whom he is reading examines them, considers their merits and explains their demerits. In addition, he is in court each day and hears pleadings discussed, and also is present when cases are decided on pleadings and facts with which he is already familiar. Given diligence and ordinary understanding, he is, at the end of a year, equipped to undertake the drafting of most of the cases which are likely to be offered to him. If he finds himself in a difficulty he can go to his former master, or to a friend of more experience, or greater aptitude, in the written presentation of a claim or a defence, and have his difficulty solved.

The first lesson that a young man learns is the vital importance of these documents. Every now and

then he will hear a successful objection taken that such and such a statement cannot be received, because there is no mention of it in the claim or defence. Or some point of law is ruled out on the ground that the facts to support it are not in the pleadings. Two or three cases lost by careless and defective pleadings destroy the practice of any young barrister. Solicitors fight shy of him on the ground that he "cannot plead"; and no amount of clever advocacy compensates for that fundamental and far-reaching defect.

No counsel, however, experienced, unties a bundle of papers preparatory to drawing a pleading, without a sense of the responsibility which rests upon him and of the retribution which may overtake him and his unfortunate client if he makes a mistake.

First of all, if he is about to settle a statement of claim he reads all the papers through and then asks himself if the solicitor has furnished him with every necessary fact. Is there any gap which the solicitor may possibly close up by asking a question of the client or a witness? Is any document missing? Is any essential fact left in doubt, which, upon further enquiry, might be made certain? When satisfied that he has all necessary information, he groups together all the material facts in chronological order and studies them to see if they collectively disclose any and what cause of action. If there are alternative causes of action, he separates the facts appertaining to each, and keeps each cause of action separate both in the body of the statement of claim and in the claim for relief.

Then he drafts paragraph after paragraph, striving always to use the simplest, clearest, shortest words and sentences.

The care with which these documents are drafted may be gathered from the fact that sometimes two or even three drafts will be prepared, and it is no uncommon thing for a man making £2,000 a year to spend six to eight hours on a single pleading. For that he will be paid two guineas. But he recognises that it will, or may be, the foundation of an action, in which every word of his draft will be read by an extremely acute opponent, ready at the outset to apply in chambers for particular, or for the striking out of a paragraph on the ground of its irrelevancy, or of the whole claim on the ground that it discloses no cause of action, or that it is prolix, embarrassing, or vexatious. Also at the trial it will be the principal document studied, by a judge, who is not going to allow public time to be wasted by any evidence or arguments not justified by the pleading, or which may take the other side by surprise.

Similarly a defence is a document demanding the greatest care. What can and should be admitted ? What should be denied ? What affirmative case should be set up ? Have all the facts been obtained, sufficient to found the affirmative case, and, generally what line should be taken in the defence ? Solicitors frequently expect counsel to advise upon the right line to take, and an imprudent defence, such as an allegation of fraud, or a justification, may end in exemplary damages and the just censure of the rash pleader.

Those who are accustomed to the clear, simple and precise language of modern English pleadings read with a sense of shock the high flown irrelevant and not infrequently abusive documents, which in this country do duty for the initial statements of the parties. A phrase such as, the defendant is a "cunning man", is an irrelevant statement which should not disfigure a formal document ; but is in fact almost common form. It does not matter to the court whether he is crafty or simple. The question is, has he a good defence to the action ?

The failure of practitioners to appreciate the importance of accuracy and completeness in these documents results in the losing of cases. Hardly a day passes in the High Court without some judge criticising with justice some grave, irremediable, elementary defect in a plaint or written statement. This criticism is usually evoked by the complaint of the counsel before him, who speaks feelingly of the difficulty in which he and his client are placed by the negligence of the pleader in the lower court ; or the failure of the client in giving his original instructions, or the negligence of the pleader in not originally extracting the whole case from his client. In this country where legal practitioners do the work both of solicitors and counsel, the very best advice that can be given is, never to commence a draft till every fact has been got out of the client and every document obtained. Before sending out the final draft it should be searched minutely for omissions and all unnecessary statements should be ruthlessly cut out.

Apart from those cases in which a cause of action has only been hinted at and no sufficient facts pleaded, or in which the written statement fails to set up the appropriate defence, the most serious general defect is the omission to give dates and proper particulars, see *Gauri Shanker v. Manki Kunwar*, (21 All. L.J., page 570) and the dangerous and improper practice of pleading fraud where in truth no fraud exists. In England a charge of fraud is regarded as so serious a responsibility, that it is the recognised practice of counsel to require instructions in writing before they allege fraud, and also in most instances to require the solicitor to bring the client to a consultation so that the client may realise the risk that he is running.

When the result of a trial shows that the charge of fraud ought never to have been brought judges say hard things of the client, his solicitor and counsel, and one or two censures of this kind operate disastrously on any man's practice. Moreover an unfounded charge of fraud tends to prejudice the tribunal, and many a lost case would have had a different result if the pleader and solicitor had shaped it differently. Of course, when a man has clearly been the victim of a fraud, he should fight the case on that issue, and a charge of fraud successfully brought home to the opposite party repays one for the anxiety of the trial; but in twenty years busy common law practice, a barrister of good reputation will not as a rule plead fraud, or depend on the ground of fraud, or "justify" more than six or eight times.

The danger of justification is also not understood in this country. In the somewhat infrequent cases

of malicious prosecution, false imprisonment and defamation, justifications are pleaded without realization of the danger, where other defences would be far safer. Take an ordinary illustration of a defence to a suit for malicious prosecution :—

‘ A ’ goes to his garage and cannot find an old outer cover which two days before was leaning against the wall. He asks his chauffeur. The chauffeur says he knows nothing about it. ‘ A ’ makes enquiries, and eventually the clerk of a vakil tells him that he knows the chauffeur and saw him a few evenings before carrying an outer cover and turning into the compound of a motor-dealer. ‘ A ’ goes to the motor-dealer, and is told that a young man did come at the time and wanted to sell a used outer cover, but that the proprietor did not examine the outer cover and at once told him to go away. ‘ A ’ describes the chauffeur and arranges to drive by with the chauffeur so that the motor dealer can see him. ‘ A ’ does so, and the motor-dealer tells him that his chauffeur is the man who tried to sell the cover. ‘ A ’ thereupon prosecutes. The loss is proved, the clerk and motor-dealer give evidence, and then the chauffeur admits that everything they have said is true; *but* it was not his master's cover he was trying to sell, but one that belonged to a friend. He calls the friend, the friend produces a used cover. Neither the clerk nor the motor-dealer can swear that it was not the cover. The friend explains satisfactorily enough how he might lawfully have been in possession of the cover. The Magistrate acquits. The chauffeur then sues for damages for malicious prosecution.

Now although ' A ' may feel certain that the evidence of the chauffeur and his friend was false and that the Magistrate was deceived, what line is ' A ' to take ?

What advice should be given ?

One form of pleading will make it practically certain that ' A ' will win the case ; another form of pleading will make it practically certain that ' A ' will lose, and will have to pay exemplary damages, which, with costs, may easily come to Rs. 1,000. The prudent course is to admit the prosecution and the acquittal, to deny that it was malicious and to allege that the defendant had reasonable and probable cause for the prosecution. The particulars of the reasonable and probable cause will be (i) the original loss of the cover, (ii) the statements made by the clerk and dealer before the commencement of the prosecution, (iii) the reasons which entitled A to believe the clerk and the motor dealer. That defence does not attack the character of the plaintiff or impugn the justice of the Magistrate's decision, but merely says that the defendant acted in good faith, as a reasonable and cautious man, upon information that he was entitled to believe.

On facts like these the defendant could hardly fail to get a decree in his favour. Very different will be the position if he is so unwise as to plead a justification, that is to say, that the charge brought was " true in substance and in fact. " Then he will have to prove nothing short of the fact that the chauffeur was a thief, and that the friend of the chauffeur committed perjury. Is he likely to be able to do so,

When, throughout the trial, there will be running, irrelevantly but subconsciously, through the Judge's mind the thought that another judicial officer after careful enquiry dismissed the charge of theft ?

If a defendant fails in a justification, the recognised practice is to award very heavy punitive and exemplary damages, so as to warn other people not to do similar things ; and, in the case under consideration, a chauffeur on Rs. 40 a month might well expect to receive Rs. 500 to Rs. 700 as damages.

Justification in libel is equally dangerous, and a client may be called upon to pay Rs. 5,000 when he might, had he apologised at the earliest moment, or in the defence, have escaped with nominal damages. There are however some libels for which heavy damages must be given, no matter how prompt or unreserved the apology. Still an apology always counts, and is frequently the means of bringing the parties together.

Every lawyer wishes to succeed, every lawyer wishes to be a sharer of the great prizes which are enjoyed by the leaders in his profession. Given some natural aptitude, any man may rise to the top by laying his foundations well, and by prudence and hard work. A man who determines to achieve a reputation for giving wise advice, for simple, clear and accurate pleading, for complete knowledge of his case in court, has set his feet on the right path, and will overtake and surpass men of greater ability and standing who have never schooled themselves to consider with care what course a client ought to take, or

what they are going to put on paper or to say in court.

This book should be in the hands of every practitioner and every student. Its value does not lie in the opportunity it may afford for the unintelligent copying of precedents ; but in the opportunity which it gives for a clear knowledge and understanding of the principles which underlie and govern a most important and most critical part of a lawyer's work..

It is the outcome of collaboration between Mr. Justice Walsh and Dr. Weir. My friendship with Mr. Justice Walsh is of over 25 years' standing. As far back as 1900 he had already earned the reputation of being an exceptionally clear and concise pleader. He was a formidable opponent in court. No matter how engagements pressed upon him he knew every fact and detail of his cases, and the law applicable to them. In accordance with that most excellent and invariable English practice, he had, on a sheet or two of paper, every material date and fact.

Of Doctor Weir, need I say more than that in every district of this Province this book will be read by men who remember with gratitude how pleasantly and successfully he introduced them to the mysteries of "the rule against perpetuities," the doctrine of relevancy, 'contribution' and the thousand perplexities which confront the beginner ?

GRIMWOOD MEARS.

June, 1925.

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CHAPTER I

THE ART OF PLEADING

Every lawyer knows what is meant in the law by the word "pleading." It means other things in other connections. A sinner may plead for pardon. An advocate may plead for his client. But "pleading" is now a word of art, or a technical word, for the formal documents in which the parties to a law-suit state their respective cases. In the old days, that is to say, certainly down to the days of Edward III, or the 14th century, they did so by word of mouth. One's knowledge of the manners and customs, and the terrible oaths of men, in those warlike days lead one to suppose that their oral efforts must have been rousing productions. The need for a permanent record in writing must have been very early apparent, though the change, like most legal reforms, was doubtless made after much deliberation and hesitation. The reason for a written record is mentioned by Lord Bacon in one of his essays in 1596 :—"Pleadings must be certain because the adverse party may know whereto to answer." Blackstone in 1768 describes them as, "the mutual altercations between the plaintiff and defendant, which are at present set down and delivered into the proper office in writing." In modern days the title "pleader," except in India where it denotes a rank in the legal profession, has been applied with special intention to a practitioner whose chief occupation is that of drawing the pleadings or formal documents. The fear and detestation,

not-unmixed with envy, in which the pleader was held by the members of the public, makes it probable that the title once applied to advocates who appeared in court. The "pleader," or "special pleader," who mainly works in Chambers, and is often the most gentle and guileless specimen of the *genus* lawyer, can hardly have been sufficiently familiar to the public, or sufficiently truculent in his conduct, to justify the opprobrious epithets applied to "pleaders" in the literature of all centuries. A Bodleian MSS. in 1430 speaks of "Plederes, which for lucre and meede, meyntene quarelis, and questis doon embrace." In 1629 a dramatic poet writes of "The tradesman, merchant, and litigious pleader, and such like scarabs bred in the dung of peace," while in the letters of Junius in 1777 the *dictum* that "the learning of a pleader is usually upon a level with his integrity" reads more like a back-handed than a genuine compliment, though it might well be paraphrased, into "the integrity of a pleader should always be on a level with his skill" and used as a motto for this book. For unless the pleader intends to be honest and to use his learning on behalf of his client in the legitimate prosecution or protection of his rights, he may as well put down this book at once. It is not written for him, and he will find little in it to help or encourage, and much advice before which he will have to place a negative.

"Pleadings," as the word indicates, must have originally embraced only those formal documents which were subsequent to the plaint. The "plea" is the natural attitude of the defendant. And the plaint was originally known as the declaration, or

count, the latter term applying to the separate specific matters, or clauses, into which the former was subdivided. You might have a declaration, containing only the *indebitatus*, or common count, for a simple money debt, or a single allegation of trespass, or you might have one containing several counts, either alternative or cumulative. In answer to the one, you might defend by the plea of "never indebted," which traversed, or put the plaintiff to the proof of, all the facts necessary to establish his claim. And in answer to the other, if the act complained of was justified by some statute, you might defend by the simple, but sometimes vague and irritating plea of "not guilty by statute." These elementary and fundamental documents in every law-suit were often followed, as occasion demanded and circumstances justified, by the plaintiff's reply, the defendant's rejoinder, and so on with other terrible weapons like the rebutter, and surrebutter, as the parties continued, in the hands of their expert pleaders, to wage their paper warfare in an effort to score a victory without the necessity of a trial at all. And so, for convenience sake, the mighty collection thus accumulated came to be known as the "pleadings," and thus they are still known to this day, though stripped of many of their highly technical and scientific attributes. Many a plaintiff in those days of high pleading was non-suited without an opportunity of showing himself in court, and explaining his grievance to the tribunal. This would happen when the defendant, by assuming all the facts alleged against him to be true, was allowed to object to the claim by a *demurrer*. His lawyer demurred to the claim, and proposed to show to the court that no cause of action was disclosed by the plaintiff's declaration,

and counts. The matter was set down for argument before the court as a point of law, and woe betide the plaintiff if his pleader had made a slip. He could come again with a new and a better declaration ; but, for the time being, his suit was dismissed with costs. No better example can be given of this procedure than an authority contained in an old report. The plaintiff complained of a wrong committed by the defendant who had seized some cattle which had damaged his land, and who claimed to have acted under what was known as "distress damage feasant." The real question was whether the defendant had properly fenced his land, and whether the act of the cattle in walking inside and helping themselves to the edibles they found there, was not really the defendant's own fault. The plaintiff's declaration, which was a lengthy and learned document, happened to allege that the plaintiff's cattle were *on* the highway. Now the proper use of the highway is passing along it. You must not stay, or loiter on it, or allow your cattle to stray thereon. At least, if you do so, you do it at your own risk. The plaintiff's pleader ought to have said that the cattle were *passing along*. If he had done so, he would have shown that they were lawfully there. The defendant's pleader detected the error. The evidence at the trial might have shown, one way or the other, what really happened. But the defendant demurred, and the poor plaintiff's suit was dismissed because, not having alleged that the cattle were passing along the highway, and therefore lawfully there, he had failed to show a cause of action. Perhaps the defendant was really right, but the plaintiff had no chance to prove his case. If his

pleader had known that the cattle were straying, he ought not to have allowed the plaintiff to persist in his suit. It looks very much as though the plaintiff's pleader either did not know the law of highways, or was a careless fellow who did not take the trouble to plead with scientific accuracy. ✓

Some of the old judges of those days have been criticised for their pedantry and high technicality. But it was the procedure which was mainly at fault. To us, in these days, it appears antiquated and short-sighted. The more speedy methods of modern life, and our more practical, and, as we often please ourselves by saying, our more enlightened views of business, necessitated a change to simpler methods. The object of the legislature to-day is to enable the courts to "get to the merits," and so to administer justice as to make a speedy and final determination of the real controversies between parties. The English courts have fully entered into the spirit of public feeling on the subject, and both pleadings and procedure have been simplified to meet modern ideas. In the main, the result has been a great improvement in achieving the real object of courts of law, and a strengthening of the confidence of the commercial public in the administration of justice. But it cannot be denied that the remedy, like many others, has brought with it new grievances. With the decline of the former high standard of exact and scientific pleading, there has been a distinct deterioration in the practice. Unless slipshod methods, and diffuseness are discouraged and checked, they naturally flourish and abound. The practitioner relying upon a knowledge that the tight hand which used to be kept over slips, and vague generality, has been relaxed, is con-

tent to conform to a lower standard, and has grown more rambling, and often, therefore, more diffuse. It is easier to be long-winded than concise, when conciseness involves precision. It is easier to cast your net wide than to make a selection of a more limited area which may miss your object through your own lack of judgment, or of clear vision. The result of looser pleading in England has been to produce looser methods of thought, so that complicated cases have got into a tangle which might have been avoided, and have ended in a visit to the Court of Appeal to straighten them out.

• The plain-thinking business man may well say, 'But if scientific pleading, and highly technical procedure for adjudicating upon it, have been rejected in favour of simpler methods with the object of forcing the parties into court as soon as possible, and of disposing of the controversy with a *minimum* of cost, why have pleadings at all? If a man owes me a sum of money on a contract, and claims that he is not bound to pay it, our arguments will appear in the correspondence which has passed between us. Each of us knows the other's view, and all we need do is to lay our correspondence on the appointed day before the court to which I have summoned him by a writ, and ask it to read the letters, and, after hearing us both, to decide which is right.' No doubt, in the simple case so stated, this could be done without risk of injustice. But litigation is not for the most part concerned with such simple disputes. And for them, summary procedure, and Small Cause Courts can always be made available. But rules of practice and procedure have to be universal in their application,

subject to special exceptions, and to provide a machinery which will work every day for everything which comes along. If the machinery cannot stand the strain of a heavy, complicated, or difficult dispute, and breaks down, it is inadequate. It is really a sufficient answer to say that our legislators and lawyers cannot have been wrong throughout the ages in compelling all parties to present a formal statement of their case before the tribunal begins the final task of adjudication. Tested by all the teaching and experience of the greatest lawyers in all generations pleadings are indispensable. Against the considered opinion throughout the ages of those best able to judge, there is no appeal. *Securus judicat orbis terrarum*. For the same reason the modern pleader must take himself and his task seriously, and while availing himself of the greater freedom due to the less exacting requirements of modern rules, he must always aim at the highest standard of scientific arrangement, precise statement, concise phraseology, and sound legal reasoning; bringing to the framework of the modern edifice as good material as he would have been compelled to supply if he had lived a hundred years ago, in daily fear of a *d-murrer*. He is really the architect of his client's structure; he may be also, when the case comes into court, the builder, asking, when he has constructed the building with his client's material, for the judge's certificate of success. But as he lays his plan in the first instance, providing in the plaint of every item which will be required before the edifice is completed, so must he who has to build thereon eventually construct. And the pleader is not unlikely to be the

best artist, who is most keenly conscious of the importance of care and foresight, and of the dangers and difficulties of his task. That the modern English system works satisfactorily on the whole may be gathered from the fact that the Government of India in the first Schedule to the Civil Procedure Code, and particularly in the rules relating to pleadings, and matters cognate thereto, has adopted in their entirety, with slight modifications to meet local requirements, the Rules of the English Supreme Court. A man cannot hope to become a sound pleader in India, unless he has grasped the English principles, and acquired some knowledge of the English practice.

No doubt, many pleaders prefer to embarrass and obstruct the speedy decision of the case in accordance with truth and justice. This is not difficult, especially in India, where the imperfections of the machinery, the lack of opportunity for practical training in the application of the first principles of the pleader's art, and a tendency in Indian litigation towards prolixity, ambiguity, and discord, provide a wide field for diffuse discussion. If a practitioner is content with the position of the paid agent of his client, and regards a visit to the court of appeal, or even to two courts of appeal, or to as many as there may happen to be, as an object to be desired, rather than a misfortune to be avoided, there is little or nothing in India to stop him. He is impervious to the shafts of such "public opinion" as exists, and immune from attacks for negligence. The criticism of the court is all in the day's work, and will pass over him like water over the duck's back. There is little to discourage him from

becoming a "scarab," and a professional dealer in idle and, to him, profitable litigation. He will scoff at the principles, practice, and precedents collected in this book, and continue to wrap up his client's cause in a mass of verbiage, arranged in alternatives and ambiguities which will enable him to shift his ground in each court, and to change his direction with the frequency and rapidity of the hunted hare.

But if he wants to become a successful pleader, and a master of the art, he must cultivate a method of clear, and direct statement. This is not so easy as it sounds. There are those who regard it as so simple as to be almost beneath them, and who look upon prolix ambiguity as a proof of cleverness. The best answer to this view is that it is found in its worst forms, and in its most constant manifestations, amongst the rank and file of the incompetent and indifferent practitioners. The proportion of those who can be trusted to make a clear and concise statement of a complicated question of fact is small, and of those who are able to select the one point of law upon which their case turns, smaller still. It may be confidently said that in the great majority of cases, the first essential is to arrange your statement in chronological order. "I wish, Mr. So-and-So," said a judge wearily to counsel (and how many say it to themselves with a sigh?), "that you would adopt some order in your statement; chronological if you can, but order of some kind." The goal to aim at is the production of a compendious, but comprehensive statement, omitting no essentials, but stating nothing superfluous, in such a form that it may be read to an audience without producing weariness, and

understood without necessitating recapitulation.) A paragraph, or a passage, which cannot be followed without turning back to read it again, must be obscure. In order to carry with you the mind of the reader, you ought so to arrange your sequence of paragraphs as to lead by gradual stages up to the central and critical point. When this is reached, the way is clear for stating the relief claimed.

The framing of the relief is a task, both in substance and in form, as exacting and important as the statement of the cause of action. The one is the correlative of the other. The two together constitute the fundamental essentials of a scientific pleading. The correct and careful pleader first decides what is the cause of action which his client's statement of facts discloses. If he cannot put them into a pleading which discloses a cause of action known to the law, it is almost certain that his client has no case. But when he is able to satisfy himself that a legal claim is established if the client's allegations of fact can be proved, his next task is to decide what substantial relief logically results from a claim so proved. The pleading is a bad one on the face of it which claims a relief covering a wider ground than the allegations of fact in the body of the plaint justify, or which fails to claim that which logically results from such allegations. In either case embarrassment is certain to result at the trial. In the one case, the pleader finds himself driven to fight questions and issues which his client's case fails to support. In the other case, he discovers, after succeeding on all the relevant issues, that the court declines to grant him all the relief to which he now finds the party to be entitled, because

some of it has not been claimed and is outside the subject-matter of the suit as planned in the pleading. In the majority of cases, where the merits justify such a procedure, the Court will allow the relief claimed to be amended so that justice may be done, and a final determination of the controversy reached. But it is well not to have to rely upon this. There may be objections, and practical difficulties. The course proposed may unduly prejudice the defendant. It may entail an adjournment, and the payment of costs. And in any case it is a confession of bad workmanship, and a superfluous and unnecessary task, to be compelled to ask the court for concessions and privileges which are matters of grace and not of right, and which may when granted, if at all, fall short of the full measure of redress. In India where the very jurisdiction of the various subordinate courts turns in many cases upon the nature of the relief sought, as well as upon its pecuniary value, the correct frame of the relief is really essential before the suit is launched. Many pleaders find it of great assistance, when framing the relief in its final form in the pleading, to state precisely, by reference to their numbers, the exact paragraphs of the body of the pleading under which each clause of the relief is claimed. Thus the pleading will claim (a) that the plaintiff be declared to be the owner of Blackacre, under paragraphs 1 to 6 hereof; (b) that the plaintiff be granted a decree for joint possession of Whiteacre under paragraphs 7 to 9 hereof; and (c) Rs. 300 under paragraph 10 hereof. To sum up, a properly pleaded claim must always fulfil one condition. Upon the assumption that the allegations contained in it are true it ought to entitle

the plaintiff to an immediate decree for the whole of the relief claimed. It is an *ex parte* document. If it cannot achieve this small measure of success when unopposed, it is not likely to do better in the teeth of organised opposition.

The task of the pleader for the defence, though no less important than the work of his opponent, does not require the same degree, either of forethought, or of preparation. He has not to decide whether his client's case is a good one which is capable of being stated in legal phraseology constituting a cause of action. His course is largely marked out for him by the form of the claim, and he must follow it as laid out in the plaintiff's claim as best he can with the materials, and on the lines, provided for him by his own client. He can shelter himself behind a bare negative, and, like the election-candidate in Pickwick, "deny everything." In the old days, in English pleading, a defendant charged with the commission of some tort might content himself with a defence consisting of the simple and familiar expression, "Not Guilty." This form has, in modern days, been forbidden, except in certain special cases in which the acts complained of are protected by statute, in which event "Not Guilty by statute" may still be pleaded. But as a general rule, and according to the now universal practice, he must either specifically admit or deny the main allegations of the plaintiff. He may still shelter himself behind an impenetrable negative. Thus in an action for ejectment by a plaintiff who claims to be the owner of the land, or in some other way entitled to turn the defendant out of the land of which the defendant is in posses-

sion, the defendant may merely decline to admit the plaintiff's allegations, and allege that he, the defendant, is in possession. In the old days this was known as the plea of "*liberum tenementum*," or "my freehold." In other words, "prove your case; I am in possession of my own freehold; turn me out if you can; I leave you to succeed or fail on the strength or weakness of your own title." A very common, and, in many cases, a very necessary illustration of this attitude, occurs in cases of defamation. The defendant either does not admit, or expressly denies, that he ever published the words complained of, whether by writing or by word of mouth. He may legitimately do this even though he knows that he printed them, with a definite purpose, in his newspaper, and intends to say that they are all true. But he denies the publication because he wishes to force the plaintiff to prove it, either by going into the box himself and submitting himself to cross-examination, or in the case of some alleged slander, which may have been only harmless gossip, or an idle jest, to force into the witness-box the "tell-tale-tit" who has repeated and exaggerated the words and distorted them beyond their real meaning in order to cause annoyance to the plaintiff and trouble to the defendant.

In connection with such cases as a suit for defamation a useful illustration may be given of the defective pleading known as a "pregnant negative." The plaintiff alleges that the defendant "falsely published" certain defamatory words "of and concerning the plaintiff". The pleader may not plead that "the defendant denies that he falsely published the alleged words." This is ambiguous, and

embarrassing. It may mean that he denies publication only, or that he admits publication but denies the falsity, or, in other words, that he alleges that they are true. Similarly, he may not plead that "the defendant denies that he published the said words of and concerning the plaintiff." This may mean that he denies publication only, or that he admits publication, but denies that the words referred to the plaintiff. He must specifically state whether he admits or denies publishing at all. A very common form at one time in England of avoiding this fallacious method of denial, which the plaintiff is entitled to have struck out as embarrassing, was to plead that, "the defendant denies that he published the said words as alleged or at all."

The simple denial was always called in the old days the "traverse." One of the chief and most difficult tasks of the defendant's pleader is to decide whether his client's case which appears to be true, is sufficiently pleaded by a mere traverse of the plaintiff's allegations, or ought to be stated by "pleading over"; that is to say, by alleging special matter, which is sometimes a "confession and avoidance," and which is done in some parts of India by adding a sort of supplementary defence under the general description of "special pleas." It may be asked why, if your client has an additional answer, and a more effective one, in the form of special matter over and above that which is put in issue by the claim, he should not in every case put it forward at once. The answer is, that unless the law requires it as a matter of justice, and as notice to the plaintiff to prevent unfair surprise, it is bad pleading "to jump before you come to the stile";

i.e., to allege superfluous matter, which you will be able to rely upon at the trial even though you have not made the plaintiff a present by giving him previous notice of it.

On the other hand, where the real defence is "confession and avoidance", it must be expressly pleaded. A simple illustration will suffice. Let it be supposed that the plaintiff complains that the defendant unlawfully beat and assaulted him, and that he claims damages for the wrong done. If the defence be that the defendant did indeed beat and assault the plaintiff, and knock out three of his teeth, and left him senseless on the ground, and that he did so because the plaintiff committed an outrageous and unjustifiable assault upon him, and that if he, the defendant, had not done so, he would have been badly injured, this must be specifically pleaded. It would be a serious mistake to omit to "plea over" specially. To deny that the defendant "unlawfully beat the plaintiff" would be a "pregnant negative." To deny that he beat him at all would, in the circumstances, be extremely foolish. "A traverse," moreover it has been said, "cannot be made to do the work of a plea in confession and avoidance." Its office is to contradict, not to excuse. Allegations which are to be relied upon as justifying an act must not be kept back, concealed, or insinuated into a plea which denies the act. The penalty, if they are, will be that the judge at the trial will exclude the evidence, or make the defendant pay the costs or an adjournment to enable the defence to be raised, and the plaintiff to meet it.

There is reason in this, and it ought to convince most sceptical that, though pleading is no longer exact science, its principles have a scientific basis ought to be understood and mastered if fundamental error is to be avoided. The reason is this. As long as you leave the plaintiff to prove his case, and content yourself with a mere negative, the onus is on him. But the moment you begin to assert some new fact, which, while accepting the plaintiff's case as a fact and in law, superimposes upon it fresh considerations which establish from your side a complete answer and defeat his claim, the onus is shifted. And you cannot prevent it from shifting by introducing into your traverse what is really a matter in confession and avoidance. So that on the whole it may be said that if you put the matter to the test, when preparing to plead your defence, by asking yourself upon whom the onus will lie of proving what you wish to allege, and, so testing it, you are satisfied that the onus will lie on the defendant, you may be equally sure that you ought to set it up by a special plea.

It is not necessary, as a rule, to plead law in a defence though if you rely upon the absence of a deed or upon the omission to have a deed registered, or upon the Limitation Act, or upon such other like matters which make the plaintiff's claim defective by reason of failure to comply with a statutory provision, it is better to plead the precise statute and section. Where, as in India, most of the law is codified, so that the absence of such a plea can seldom be objected to on the ground of surprise, this form of pleading the statute is not of vital importance, and need never be resorted to unless the defect is one

which is apparent on the face of the plaintiff's pleading. The Civil Procedure Code, by Order 8, rule 2, enjoins the defendant to "raise by his pleadings facts which show that the transaction is either void or voidable," but this clearly refers to "new facts to be specially pleaded," and does not, of itself, require a statutory plea. It is bad pleading to plead additional facts on behalf of the defendant, and then to show that the plaintiff's claim is bad in law, because the plaintiff's claim is not a combination of the two sets of facts, and must be tested, as a matter of law, upon its own allegations, and upon no others. The additional facts pleaded on behalf of the defendant raise an issue of fact, and do not put in issue the question of law whether the plaintiff's facts by themselves disclose the existence of a cause of action.

Formal pleas, in addition to traverses and pleas in confession and avoidance, such as pleas to the jurisdiction, and pleas in abatement objecting to the non-joinder, or mis-joinder of parties, commonly called dilatory pleas, would appear to be popular with all classes of pleaders, and almost universal in certain parts of India. They are called "dilatory pleas" because they raise for the most part merely technical objections of form, without presenting a substantial answer to the merits of the claim. They may, in certain instances, such as the jurisdiction of the court, or the absence of a necessary party who is dead and cannot be joined, or who refuses to be joined, if substantiated in fact, be fundamental, and fatal to the claim. But where, as is too frequently the case, they are merely meaningless pleas without substance, and having no relation to the real facts, they

are idle, foolish, and improper, and ought to be struck out by the court, with a penalty by way of costs against the party responsible for introducing idle matter for the mere purpose of causing embarrassment to the other side, and unnecessary time and trouble to the work of the court which has only to decide the real and substantial controversy.

The foregoing principles are clearly embodied in the Code of Civil Procedure, and the above exposition should remove any difficulty which an inexperienced practitioner may find in applying the rules contained in the First Schedule in practice. Order 8 deals with the written statement of the defence. Rule 2 thereof requires new facts to be specially pleaded. Rule 3 requires the pleader to deal specifically with each allegation which he does not admit, and to state whether it is denied, or merely not admitted. Rule 4 is to much the same effect, making evasion, or the use of a "pregnant negative," unlawful. Rule 5 treats a fact as admitted which is not specifically dealt with by the defence. The wording of this rule, which is as follows, has been sometimes criticised :—

Order 8, Rule 5.—"Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability :

Provided that the court may in its discretion require any fact so admitted to be proved otherwise than by such admission."

There ought to be no difficulty to any one not on the look-out for objections and desirous of finding

difficulty, in applying this rule in practice. It means what it says, even though it may say it clumsily. Whether a fact is denied, or specifically not admitted, the result in its effect upon the issues in controversy is the same. The fact is put in issue in either case. The rule of practice commonly acted upon by experienced pleaders is to deny specifically that which is within the knowledge of the defendant, and that which he is prepared to negative by proof positive, and merely to state that he does not admit matter of which he has no knowledge. It is in respect of the latter that care is required. If the pleader desires to put in issue a matter by not admitting it, he must be careful to say so. The sole object of the Rule is to compel him to make it clear how much he disputes, and how much he admits. The rest of the Order deals with grounds of defence which have arisen since the commencement of the suit, and with the method of raising a set-off. matters of detail which need not detain us.

While the rigid rules of pleading which were adhered to in the old days have been greatly relaxed, and elasticity has been introduced in the interests of justice by provisions for amendment for the purpose of arriving at a true conclusion upon the rights of the parties, what was said by the learned authors of *Smith's Leading Cases*, Mr. Justice James Shaw Willes and Mr. Justice Keating, is as true today as ever. "No legislative enactment can in all cases prevent the expense and delay which result from the necessity of amending untrue or imperfect narratives of the facts relied upon by the respective parties. Such inconveniences are to be avoided by taking care in the first instance to make the pleadings true and perspicuous,

adopting the known and understood *formulae* used for the sake of brevity in cases of frequent occurrence, and, where there is no such *formula*, stating the material facts as they can be proved to exist in intelligible language."

CHAPTER II

HOW TO START

In the Hundred Yards sprint it is essential to get well off the mark. Pleading is not a sprint, but the illustration will serve. A man seldom recovers from a bad start. The pleader should always remember that the actual drafting *in extenso* of the plaint, or written statement, is the last lap. The first thing the plaintiff's pleader must do is to make up his mind whether his client has a case, and what it is. A great lawyer, who was a famous practitioner in Chambers, once said that when he was asked to advise whether his client had a good claim, his invariable practice was to endeavour to draw up a skeleton plaint, upon which, if the allegations were admitted to be true, he was prepared to give judgment in his client's favour for the relief claimed. Unless the skeleton plaint could survive this test, he was satisfied that his client had no case.

This advice sounds obvious and elementary. But how many pleaders in the mofussil attempt this procedure? There is so much in the average law-suit which is obvious, when it is ascertained and understood, that practitioners are apt to take things for granted, and to overlook the possibility of latent traps and pitfalls.

It is sometimes said that a plaintiff ought always to win, because his pleader has no business to make a claim at all, unless it is a sound one, and that, when the plaintiff fails, it is either because he has made false allegations, or because his pleader did not know his law. The pleader will often retort upon this latter

charge that he did not know the true facts when he began. Whose fault is this ? It is often the pleader's own fault. It may happen that a story told you by one who fancies that he has a grievance, sounds plausible and even convincing, until you begin to commit it to paper in the form of a scientific pleading. You then begin to realize that there is something dubious about it. You detect some glaring improbability, or an apparent gap in the sequence of events, or some mysterious ambiguity which makes you wonder whether you have been told the whole truth, or even makes you sceptical as to whether the plaintiff intends you to know the whole story. When the pleader reaches this stage in his process of mental reasoning, he ought to stop. In conversational language, "there is a screw loose somewhere." His business, in these circumstances, is to insist upon having fuller information, to interrogate his client as to all matters which seem incredible, or mysterious, and to insist upon his original statement being supplemented, so as to remove, as far as possible, all doubt and ambiguity. To go on with a plaint based upon allegations which are ambiguous, inconsequent, or incredible is bad workmanship, foolish, and often patently dishonest. After all, the client cannot be expected always to know what is material. He may be a knave, but in the matter of deciding what is material to his case he is almost certain to be a fool, and may conceal something which is helpful because he fears that it may be detrimental. The trained expert can generally tell when something is being withheld, and it is his business to probe the matter to the full, before he finally starts on the plaint.

When the reader has got all the information he is likely to get, he can start putting the plaint on the stocks. He has the rough material; he has filled the gaps, and collected all that he can; it is now his business to piece it together scientifically, according to certain prescribed rules, which he must adapt, modify, and bend to the special circumstances of the particular case, as his intelligence and experience may dictate, so welding and dove-tailing his material into a connected whole, as to create a fabric which when completed will hold together. He is not bound to be the judge of his client. That is to say, in simple matters of fact, such as, for example, whether the defendant brutally assaulted the plaintiff with a *lathi*, and without provocation, he is not bound to disbelieve the plaintiff and his witnesses. There is all the difference between refusing to accept a simple allegation of fact, and insisting, as has been already explained, upon having the obvious gaps in a story filled, and ambiguities removed. But he is bound to be the judge of his client's case. That is to say, assuming that all his client's allegations are established in fact, he ought not to lend his name to a plaint which, upon that hypothesis, fails to show a cause of action known to the law. To do so wilfully is unprofessional and dishonourable. It is a species of blackmail to lend your name to a proceeding against a member of the public by a process of law which will put him to expense and trouble, when you know, as a lawyer, that it has no legal foundation. To do so unconsciously, is to proclaim yourself a blundering practitioner, who is ignorant of his business.

What then is the best practical method to adopt

with a view to avoiding fundamental error? The scientific pleader with a complete mastery over his art is not likely to make serious mistakes. But few men are so confident of themselves as to entertain no apprehension, and men who suffer from over-confidence are the most likely of all to be caught napping. So that every pleader ought to keep a severe watch upon himself. Therefore, one of his first self-imposed tasks in constructing a plaint should be to ask himself two questions: Firstly "What should I say about this claim, as it stands, if I had to attack it as the pleader representing the other party?" He will probably find that he has plenty to say. Has he also an answer ready for the attack? Secondly, he should ask himself, "What should I say if I had to adjudicate upon this plaint from the Bench? What is the judge before whom this plaint is sure to come, likely to say himself?" If, in performing this task, (and in the ordinary straightforward case it is a simple and speedy mental process) he finds that there are no serious openings for attack, he may go boldly forward. The substance of the plaint may be regarded as satisfactory.

But it has to be put into form, the clear, concise statement of facts and deductions, required by law, leading up in simple and intelligible sequence to the relief sought. For this purpose, no more helpful method can be suggested, than to take a sheet of draft paper, and to sketch out upon it, in rough outline, the series of paragraphs into which the plaint may be most satisfactorily divided. This will include, in the first place, the names and legal status of the plaintiffs, and of the defendants, respectively. Then

any intermediate history, or other matter, such as a genealogical tree showing the legal relationship between them. It may be necessary to go back, and up in an ascending line so as to begin with the predecessors of either party, and to show their legal relationship, and then down in a descending line, stating the deaths, marriages, births, adoptions, and other matters necessary to make the legal relationship of the parties clear to any stranger who may read the plaint. It may be necessary, as the result of stating certain facts, to supplement them with a statement of inferences of fact, or with a statement of legal deductions and of legal consequences following by operation of law from such facts, though it is always wrong to plead bare statements of law as such. Then, following on in logical sequence, will come the statement of the wrong complained of, and of how, by whom, and when it occurred, and, if need be, of how, through some known agent, the defendant is alleged to be legally responsible for it ; and this, in its turn, will be followed by a statement of the loss or other consequences of which the plaintiff complains and which are alleged to have ensued in the ordinary course of events from the wrong already alleged. Lastly, comes the statement of the relief claimed, sometimes a difficult, and always an important part of the plaint. When this stage in sketching the skeleton is reached it is always possible, and generally very helpful, to draft it in full, in order to see how far it covers the ground, and how far it is justified by the rough allegations which have preceded it. So that, in effect, the last part of the plaint, namely the relief, takes its final form, before the first part. With this skeleton, mapped out to his satisfaction, the

pleader after reviewing his handiwork as a whole, can set to work and draw up the complete draft in its final form, incorporating all the corrections which he has been making during its construction, and filling in the details which are non-essential, in his own style. Before he parts with it, he should give it a final examination, particularly with a view to cutting out superfluities, which are ugly, useless, and often a source of subsequent embarrassment. If neither he nor any one else finds anything to excise, he may count himself a useful draftsman.

The reader may say to himself : " But all this is very pedantic and laborious." One answer is that what is worth doing at all is worth doing well. Another is, that the pleader has certain privileges conferred upon him by law, that he is supposed to be an expert, and that he is paid to do his best. He should leave slovenliness, and negligence, for the management of his own affairs, and not employ them for those of other people. A third answer is that a sound fabric can only be raised on solid foundations, and that if laborious and meticulous methods are adopted in the beginning, care and thoroughness become matters of habit, and what is called second nature. It is not likely that the busy man will always have time to carry through such an elaborate mechanical process in every case. But he will only have grown to be a busy man by adopting thorough methods in the opening stages of his career. And by the time he has grown to be busy, he will have acquired, by constant practice and experience, the faculty of running the stages here described into one, in most cases of no more than average difficulty,

and of performing them all by a rapid but sure mental process, without the more elaborate, artificial aid upon which he formerly relied. There have been many successful pleaders, who, after thinking over a complicated matter, could sit down and write out straightway a complete and faultless draft, ready for immediate use. But even they are compelled, from time to time in a heavy case, to fall back upon the more laborious method, and the more they have mastered and utilised it in their early days, the less they find the need for resorting to it, when practice has made them perfect. Elementary hints for beginners are not intended for experts; but no pleader ever became an expert who did not begin by teaching himself some system founded upon elementary principles.

If in doubt as to how to frame his plaint, the pleader should always consult a precedent. This is particularly important before deciding how to frame the relief. Many pleaders, when in difficulty, shelter themselves behind the supposed security of a general claim, couched in vague language. There is danger in this, as in most vague language employed in legal proceedings. It lays itself open to attack from the other side in the manner discussed in the chapter on "The Duty of the Parties." But it may be that its very generality will defeat its own purpose, particularly in the court of appeal. A plausible claim for relief couched in vague terms may succeed with the trial judge, who is impressed with the general merits of the plaintiff's claim, and whose attention is not drawn to the nature of the relief sought. The importance of obtaining a decree in the correct form is sometimes overlooked in the triumph

of success at the trial, with the result that when it comes to be closely scrutinized in a superior court it appears that the plaintiff has not established his right to the relief granted, and that his advisers have overlooked some essential step which required proof in order to entitle the plaintiff to an alternative or modified form of relief, which he might otherwise have been granted. Such cases may sometimes be met by amendment, but the instances, where a successful party is allowed in the court of appeal to amend his claim so as to include some relief of substance which he has up to that stage neglected to put forward, are extremely rare.

An essential question to which the plaintiff's pleader must always address himself at the very opening of his task relates to the documents upon which he proposes to rely in the plaint. This is independent altogether of the absolute duty prescribed in Rule 9 of Order VII, which will be found discussed in more detail elsewhere, of annexing a list of the documents produced with the plaint, a rule which is honoured rather in the breach than in the observance. The pleader, before he makes up his mind about the substance, or form of the plaint, ought in every case to have a complete knowledge of all the documents necessary or material to the plaintiff's case, and also of their true interpretation, and ought also to have made up his mind about any others which may appear to stand in his way, or even to present difficulties in the plaintiff's case, a full disclosure of which will sooner or later have to be made. This is as much the pleader's business as a true understanding of the law of the plaintiff's case. The facts alleged by the

plaintiff, and the oral evidence on his side, and the due execution of the documents, are all debateable questions of facts, the truth of which cannot be known when the plaint is filed and probably not till the trial. But the documents are there. Their meaning and legal interpretation is, or ought to be, clear. And the pleader must determine for himself at the outset how far he must rely upon them, or may be compelled to disclose them, and must, according as he decides this question in the case of each one of them, further decide how he means to deal with them in the plaint. Many of them may be merely formal steps in the history of the family, or in other matters leading up to the cause of action, as explained just above in dealing with the skeleton draft, or frame-work, of the plaint. But all of them will inevitably have to be disclosed, and the sooner they are disclosed, and arranged in their true relation and context, the better for the case. Nothing does so much harm as apparent vacillation and reserve about the production of documents, and vague or shifty treatment in the handling of them during the early stages of the case. The stronger or more numerous the plaintiff's documents, the stronger his case will be. *Litera scripta manet*. And stained though the history of Indian litigation has become in the matter of false documents, a case built upon a genuine documentary foundation is like a house built upon a rock, when compared with those which have to rest, often with the result that they fall altogether, upon the quick-sands of oral testimony as understood in India.

So far, we have tried, in this chapter, to give the pleader who would tackle his task scientifically and

systematically, and who wants to know how to become efficient, a few practical and useful hints for acquiring a sound method. Passing from the general to the particular, we now come to the legal requirements insisted upon in the Code, with which the pleader must comply.

CHAPTER III

WHAT TO AVOID

No one has a right to consider himself adequately instructed in the rudiments of any art, until he has learned what to avoid. In the matter of pleading the art of which consists solely in the concise and compendious statement, in legal terminology, of the essential issues, and of the introductory history necessary to make them clear, and of no less and no more, it is particularly desirable that faulty pleading should be understood, and recognized by its features, otherwise it cannot be discarded. And for one special reason; the pleader is framing his case in the language which he is accustomed to use in conversation, and in his private correspondence. Conversational idioms and usages, unless severely checked, flow naturally from his pen. Bad habits, like weeds grow apace, and become second nature. Bad examples, unless recognized as such, are easily followed, and from constant repetition grow into conventions, and spread their influence over an ever-widening circle of operations. It often happens that the defendant, against whom some fraudulent misrepresentation, or act of deception is alleged, is described in the pleading as "a cunning fellow," or a "knave," or a "plotter against ignorant and foolish persons." It does not matter to the pleader what the defendant's character may be. It may affect the defendant's credit, and the value of his testimony, but this is a matter of evidence, and evidence must not be pleaded. What does matter is, what the defendant did on the material occasions which the plaintiff alleges to have constituted a legal wrong in the particular case, and

to have caused him the particular loss of which he complains. Any allegation amounting to "mere abuse of this kind ought to be immediately struck out of the pleading at the expense of the party guilty of it before the case is allowed to proceed further. The pleader should never forget that he is supposed to be a gentleman, vested with certain rights which carry with them their corresponding duties and responsibilities, and abuse is ungentlemanly. Every pleader should carefully read through his draft when it is completed, with a blue pencil in his hand, and ruthlessly excise every word which is calculated to give offence. He should, for the moment, put himself in the position of the other party, and try to criticise the language used from that point of view. This after all is the essence of all true gentlemanly feeling. In framing his draft he must avoid all idle repetition, and what is by no means the same thing, though the two are often found together, all kinds of prolixity. A young journalist was once asked by his editor to write a paragraph for the paper on some current topic. He was a good writer, with a fluent style, and he quickly produced half-a-column of glowing periods. The editor took up his pencil as he read it through, and cut it down to one-third of its original length. The author looked through the amended paragraph, and discovered that he had said, in a few trenchant phrases, all that was to be said, and had made his point with telling emphasis. There was nothing the matter with any of the language which had been so ruthlessly handled. It was simply superfluous. It would be well for the pleader who wants to learn to be concise to acquire the habit of

submitting his work to this treatment. He will find that the repeated practice of excision will gradually re-act upon his style, and that, as time goes on, there will be less and less to cut down, because he will automatically omit superfluities which he knows will have to come out on revision. He need be under no apprehension that the practice will cramp his style. When in doubt about introducing a particular phrase he should put it down. It is easier to cut out afterwards than to expand. And although superfluity is objectionable, and sometimes dangerous, the omission of a material allegation is worse. To restore it to the pleading will require an application for leave to amend, and no pleader ought to turn out work which he himself finds to require amendment. Applications for leave to amend ought only to be necessary when new matter comes to the pleader's knowledge, and when that happens it is the client's fault, and not the pleader's.

One form of superfluity, which is aimed at by the old familiar maxim, "Don't jump before you come to the stile," relates to matters of substance rather than to matters of form. Many illustrations could be given of this form of vice, but it is really of no practical assistance to multiply examples. What is meant is, that when, for example, you are required to draw a plaint claiming the repayment of a simple loan, and you are informed that the defendant has, either by some trick, or by some kind of coercion, or unfair dealing which you are unable to comprehend with certainty, obtained a release from your client, leave it alone. The defendant may not rely upon it. If he does, it will be time enough to plead in

reply the facts which show that it is bad. To do so in the pleadings would be to give the defendant an unnecessary advantage. You cannot tell at that stage what advantage the defendant's pleader might not reap from knowing in advance how it is proposed to meet the release on which his client relies. There is the further disadvantage that by pleading to a release which has not yet been put forward you pin yourself down to a particular form of answer to it, before you know precisely what the nature of the attack will be. You are like a man in the ring brandishing his arms about to ward off blows which his assailant has not begun to aim. Such conduct is likely to make a gratuitous opening for attack from an unexpected quarter. But in any case, it is your duty to "wait and see ;" to discover, by obtaining particulars, and by the other means provided by law, when, how, and under what circumstances the defendant is going to say that the release was given. This information will certainly aid you in discerning any weak spots there may be in his account of the matter, and, what is of equal importance, it will assist you in probing, and testing for yourself, your client's counter-attack upon the release, before committing his account of the matter to paper in a binding form. No pleader of average intelligence should experience any difficulty in recognizing a situation of this kind when it arises. The mere fact that he is puzzled to know how to deal with it should open his eyes to the possibility that he is attempting too much, and anticipating an attack which has not yet been made. The example given above is a simple and obvious one, but is sufficient for the purpose of enforcing the

injunction not "to jump before you come to the stile." Another form of superfluity to be sternly discountenanced and avoided is idle repetition. This is too obvious to require exposition. If you say it clearly and correctly, it is enough to say a thing once.

But with regard to superfluity in general, it is well to bear in mind one warning. All principles in practice have their cheeks and counter-poises. The object of a pleading is to be precise. But the pleader can only be as precise as his instructions permit. Where there is a gap in his instructions which he cannot fill to his satisfaction it is impossible for him to be exact. If he must err, therefore, from the path of strict precision, he must be careful to make his allegation too broad rather than too narrow. It is wiser to state the case too largely; the greater includes the less. The party will be allowed to prove sufficient to support a case for less than his claim; he will not be allowed to go beyond the pleading, and to prove more than he has alleged, without, at any rate, an amendment, and submitting further to an adjournment at his own expense to enable the defendant, if he so desires, to meet the additional matter.

The pleader should always be careful, when framing the relief claimed, to provide for possible contingencies which may necessitate his asking for alternative remedies, all of which may come within his client's rights. He may not be certain that he is going to get all that he asks. If a smaller sum is shown to be due than the amount claimed, a claim for the larger sum is sufficient to justify a decision in the plaintiff's favour for the smaller sum. But the alter-

native may be derived from the same legal right, and recoverable under the same cause of action as the larger claim, and yet it may require to be separately claimed to justify a judgment giving effect to it. This is *a fortiori* so if the alternative is really based upon a different though similar cause of action, for instance a verbal promise of the same kind as a written bond, or promissory note. An example of this sort of thing, and of the importance of including a claim for the original consideration, is given in another chapter. Another example may be given from an unreported case. The plaintiff sued his wife and her parents for restitution of conjugal rights, and wanted the return of ornaments belonging to the wife, which had been given to her on her marriage, and which he alleged to be his property. He did not, of course, know where they were, though he assumed that they were in the wife's custody. He sued the wife, and her parents, and he asked, as though he were asking for a kind of joint relief, for the return of his wife, together with the ornaments. Clearly what he ought to have done was to have asked for a decree against the wife, and for a separate decree granting an injunction against the parents restraining them from interfering with the wife's return home, and ordering them to return the ornaments, or to pay their value. He obtained a decree in the form of the claim. A day or two afterwards his wife died. He then wanted to execute the decree against the parents for the ornaments. He alleged that the circumstances of the marriage made the ornaments his, and that they descended to him after his wife's death. He might have raised this point in the suit but he had

not done so. His claim to execute the decree against the parents for the return of the ornaments was rightly rejected. The decree contained no separate direction against the parents relating to the jewels. It merely gave the plaintiff an order for the return of his wife together with the ornaments. As she was dead it was impossible to return them "together with" her, and unless he had established his ownership in them after the death of the wife, he had no right to them. The order was just in the form in which it ought to have been if he had merely wanted his wife back, wearing her ornaments as her *stridhan* in the usual way, and that was all that he had asked for. To have executed the decree against the parents, even if they had the ornaments after the wife's death, would have been equivalent to deciding the issue of ownership finally in the husband's favour. To justify such an order it was necessary, after her death, to bring another suit in order to establish his title. This was entirely due to the carelessness of the pleader, who would have realized, if he had applied his mind to it, that it might be impossible to compel the wife to return, but that the parents had no claim to retain the ornaments during the wife's lifetime, if they had them, and only after her death if they could establish a title to them.

The pleader who would gain a clear idea of the faults which he must avoid ought to make himself familiar with Order VI of the Code of Civil Procedure, which deals with "pleadings generally," and which is peculiar to India. Rule 16 of this Order empowers the court, at any stage of the proceedings, to strike out of a pleading any matter which is (a) unneces-

sary, (b) scandalous, (c) calculated to prejudice, embarrass, or delay the fair trial of the suit. It is much to be feared that in many parts of India this salutary provision for keeping pleadings within proper limits is very largely ignored. The question of the duty of the parties themselves to set this machinery in motion has been fully discussed in the Chapter on the "Duty of the Parties." The reasons for laying down general principles for the guidance of pleaders in a Special Order on the subject were stated by the Special Committee on Procedure in the Report which preceded the new Code of 1908. They are as relevant to-day as when they were written. The system of pleadings in mofussil, they said, was notoriously lax. Cases are expanded and grounds shifted without reference to the true facts. The pleadings are seldom artistically drawn; they are neither concise nor precise, but contain vague and general statements from which it is difficult to ascertain definitely the real question in controversy between the parties; the object of pleadings is defeated; the issue is enlarged; the result is confused; appeals are multiplied, and many cases are remanded for further trial or for the decision of issues which have been overlooked, or obscured, and much avoidable delay and expense is incurred by the parties through no fault of their own. This is a severe indictment but it is supported by the daily experience of those who practise in the Courts of Appeal, where the great mischief can be seen in its true proportions and perspective. It is not the fault of the parties; often enough it is their misfortune. It is due to the failure of individual pleaders to master their art, and where the majority of practitioners

carry on the old system without any effort to 'amend' it, there is nothing to check it. The pleaders who know their business can check these faults in others by attacking and removing the embarrassing blemishes, but a practitioner cannot recognize or effectively complain of faults of which he himself is guilty.

Two things which must be avoided in every pleading are expressly prohibited in Order VI. These are pleading evidence, and pleading law. Rule 2 of the Order provides that every pleading shall contain, *and contain only*, a statement in a concise form of the material facts on which the party relies, but not the evidence. This rule is of universal application, and excludes law as well as evidence. As to the latter, the evidence by which the facts are to be proved must not be confounded with the particulars necessary to identify the act complained of. Thus in the simple case of a claim for damages for pain and suffering and pecuniary loss suffered through an assault, the plaint must state when, and where, and how the assault was made upon the plaintiff. But, to state that it had been preceded by threats, and by previous unsuccessful attempts by the defendant, or that it took place in the presence of witnesses, or that the defendant seized an opportunity to strike the plaintiff when his back was turned, is to go into the evidence available to establish the allegation, and is unnecessary, and superfluous. It is, moreover, forbidden. So also in cases of alleged undue influence or coercion, the plaint must state the relation between the defendant and the person over whom the influence was exercised so as to show that he was in a position to dominate his will, if it was so. or the

nature of the coercion used, but not the circumstances leading up to the act, nor the appearances from which the exercise of the undue influence may be inferred. All this would be going to the evidence, and the pleader must clear his mind, and decide what the wrongful act is which he means to allege and not allow himself to be confused by the details of his client's story and to embark upon a rambling statement in which the actual wrong which invalidates the transaction is mixed up with the history of the relationship between the parties, and the circumstances leading up to and surrounding the central fact. To illustrate again, it may be pointed out that in alleging that the plaintiff has been injured by the negligent driving of the defendant's car it is sufficient to say that the driver was not keeping a proper look-out and failed to warn the plaintiff of his approach, or was driving at unreasonable speed, and did not apply his brake when he ought to have seen that there was imminent danger. It would be wrong to say that the defendant was a notoriously fast driver, or that he was driving to keep an appointment for which he was late, or that he was racing with another vehicle, for these things are not negligence in themselves, but only evidence that the defendant was negligent on the particular occasion.

Similarly it is bad pleading to plead law. Even to say that "the plaintiff is entitled to recover Rs. 500 from the defendant" is incorrect. The judges are bound to know the law. It is for them to decide whether or not the plaintiff is entitled. It is for the plaintiff to state the facts, such as that Rs. 500 was advanced, and that the defendant promised to repay

it by a certain date, with interest at an agreed rate. For the defendant to plead that he does not owe the money is also incorrect. He ought to plead the facts which he contends to afford him a defence. He may always plead that the facts alleged in the plaint "disclose no cause of action," which is merely a plea that in law the facts in the plaint, even if proved, do not *suo vigore* constitute a claim upon which the plaintiff is entitled to succeed, and do not call upon the defendant for an answer. But it is incorrect, and bad pleading, to plead, as is so often done, that "the plaintiff's claim is altogether bad and wrong and contrary to law and ought in no way to be allowed." It is also bad pleading to say that "the contract alleged by the plaintiff is invalid." The facts which are relied upon should be alleged. It is for the court to decide the invalidity of the contract. This however, must not be taken to mean that the defendant should not plead, for example, that the contract in suit is "against public policy," alleging the facts which make it so, because the issue whether it is or is not against public policy is an issue of fact, which if proved will entitle the defendant to judgment on the ground of invalidity. It is bad pleading to allege merely that the defendant had a duty to act in a specified way. The facts must be alleged which create the duty. So also it is bad pleading to allege that an act was done by some person with the authority of the defendant. The pleader should state either that the man was the agent of the defendant, with general, or implied authority to do the act complained of, or that the defendant had employed him to do the act, or otherwise given him express authority. A claim

was struck out for alleging merely that two days before his death a deceased had made a good and valid *donatio mortis causa* to the plaintiff, on the ground that the plaintiff was bound to allege what the deceased did. To allege it in the way in which this claim was pleaded was merely to state that it was a good gift, without saying how it was made. No facts were pleaded, but only law. Of course it follows that it is bad pleading to allege that under a certain deed the plaintiff is entitled to certain rights. Notwithstanding that the plaintiff must annex the deed to his plaint, the body of the plaint must identify the deed, and state briefly the material parts and effect thereof, and the facts which show that the plaintiff is entitled under the provisions relied upon to make the claim. In a defence to a claim for libel it is not sufficient for the defendant to plead that he "published the words on a privileged occasion." He must set out the facts upon which he relies as creating the privilege, or as constituting the occasion a privileged one.

Rules 9, 10 and 12, if properly understood, make it clear to the pleader what to avoid in the shape of prolix extracts from documents, superfluous quotations from letters, and recitals of conversations, and recitals of conduct amounting to a wrongful act. The method of dealing with a document has already been stated. It is sufficient to allege malice, fraud, knowledge or other condition of the mind of any person when material, without setting out the circumstances from which such condition is to be inferred. So also it is sufficient to allege that a contract is contained in a letter, or series of letters, which are identified,

or in a conversation which took place at a specified interview, or in a letter and conversation combined, without setting out at length the contents of the letter or the details of the conversation.

A "pregnant negative" is always, not merely objectionable, but fundamentally wrong, and ought to be struck out. What is meant by this phrase is that the statement to which a negative is attached is so framed, that you cannot say what is denied, whether one, or other, or both of two facts, for example, which are linked together. The favourite instance is usually given of the objectionable question, "When did you leave off beating your wife?" The question assumes that the witness was accustomed to beat his wife, which he may never have done. The answer "never" would be open to the possible construction that he was still doing so, though it would be equally consistent with the fact that he never began. This fault is worse in a pleading, because a question can be corrected in court by the Judge, while it stands in a pleading until it is removed. For example in a defence to a suit for libel it is wrong to plead that "the defendant denies that he maliciously published the words alleged," and such a plea ought to be struck out, for neither the court nor the plaintiff can tell whether he means to deny the act of publication, or the fact that he published maliciously. This is a "pregnant negative." If it is intended to deny publication, the words "or at all" must always be added. In the same way, it is evasive and wrong to plead "the defendant denies that he beat the plaintiff with a stick." If the beating is totally denied, the

denial should be plainly pleaded thus: "the defendant denies that he beat the plaintiff as alleged, or at all."

Repetition, or idle repetition of the same plea, or of the same allegations, even in an altered form, is bad and ought always to be avoided. Repetition may occasionally be necessary for the purpose of introducing an alternative method of alleging what is substantially the same thing. But repetition without a definite purpose, is useless, and even foolish. We have seen the same plea actually repeated four times in the same pleading, and the pleader making a slight variation, got the plea wrong at the fourth attempt.

The following instances of defective pleading occur with such frequency in India that it might be inferred that they have been taken from some book of precedents, or slavishly followed from specimens found by pleaders in older pleadings. They indicate an inability on the part of pleaders to understand and apply the principles laid down in Order VI of the Code.

(1) "That the defendant, notwithstanding his ability to pay, and without any reasonable excuse, has not paid the sum due though repeated demands for the same were made to him by the plaintiff"

It would be difficult to draw a short paragraph containing more irrelevant matter than the above.

(i) The ability, or otherwise, of the defendant to pay is wholly immaterial. It may arise in execution, or on application by the defendant after judgment to be allowed to pay by instalments. But it has no bearing upon the defendant's liability, which is the question in the suit. (ii) To allege the "absence of a reasonable excuse" is both bad pleading and bad law. Either

the defendant is liable or he is not. If he is liable, there is no such thing as a "reasonable excuse," in the eyes of the law, which can affect his liability. If he is not liable, he has good ground for refusing to pay, and requires no excuse. (iii) To allege that repeated demands have been made is superfluous, and irrelevant. Money payable on a due date can be sued for without any demand. The cause of action arises on the date fixed, and no further demand can affect it. Money payable on demand becomes due the moment it is demanded, and the cause of action arises when the demand has been made without result. No further demand is necessary, nor does it, if made, affect the cause of action.

(B) "The defendant made payment to the plaintiff after the day named, and before suit"

This plea is doubly defective. (i) If the defendant alleges that he has paid the amount of the claim, or any part thereof, he must state the amount of such payment. He ought to be compelled, by an application for particulars, either to do so, or to have the plea struck out. (ii) An allegation of payment must state the date when, and the place where, or the manner in which such payment was made.

(C) "That plaintiff has been led to institute the suit against the defendant at the instigation of designing persons, who are on bad terms with the defendant."

This plea is highly objectionable. (i) It is wholly irrelevant, and ought to be struck out in any event, because if the suit is ill founded it will be dismissed on proof of the fact; if it is well-founded, it ought to succeed, no matter how many persons have instigated the plaintiff to bring it. (ii) It is irrelevant

to whom they were made. The loss of money due under a contract must be identified by stating the precise details of the contract and of the parties to it, and of the money payable to the plaintiff under it. So where potential profits are said to have been lost, the manner in which they would have been made and the basis upon which the estimate has been made, must be fully set out. All these losses must be both specially pleaded and separately claimed. A defendant is not bound to plead to damages, but he is entitled (a) to know what is being claimed against him, (b) to investigate the details of the claim, and to call evidence about it if he can, and (c) to attack the estimate of profits, lost, and the basis which the plaintiff has adopted. If the basis is contained in the plaintiff's own books of business, the defendant is entitled to inspect them before the trial, and he cannot do this unless he knows what the books are, and how the claim is made up. The question as to what damages are payable in particular cases is frequently a very difficult one, and the varying nature of claims which arise, as well as the different ways in which people make their living, even when engaged in similar business, and the difficulty of analysing their accounts and of ascertaining what profit is really being made, make the application of the principles, even when ascertained, a matter of great difficulty. A book on pleading is no place for the discussion of questions of principle relating to damages. "Damages" require a book to themselves, and the law relating to them is all contained in "Mayne on Damages," which has for generations been the standard work on the subject. But the pleader's

task is two-fold. He has first to decide "the measure of damages," and then to analyse his client's facts, supplementing them with details which the client is certain to omit, and rejecting details which the client is certain to wish to include though the law does not recognize them. In no respect do the views of ordinary business man as to what is reasonable, differ from the legal standard of what is just, more than in the matter of damages. But the pleader ought to do all this before he drafts the claim. He may find it impossible afterwards to include items justly recoverable which he has omitted to claim. It is almost as bad to include claims which cannot be supported, and which will prejudice the case by giving it an appearance of exaggeration and falsity. He will have to clear up all these points before he prepares his evidence for trial, and it is far better, indeed it is the only right way, to do it once and for all when the claim is formulated. It would be foolish, to say the least of it, to formulate a claim made upon a railway company for loss of baggage without making it full and detailed from the first, so as to be able to survive any investigation which might be made into it, and without having the necessary proofs available to support it when you were asked to do so. It is just the same with a suit at law for damages. The plaint ought to contain the first and the last word on the subject from the plaintiff's side. Little more can be said by way of practical suggestion. But the pleader cannot hope even to begin to deal properly with such claims until he has grasped the essential difference between "special damages," as explained above, and "general damages," about which a word or two may

now be said. The term "general damages" comprises all those things, mentioned in the terribly defective example given above, such as bodily or mental suffering, and loss of reputation, which cannot be stated in terms of money, or of money's worth. In cases of breach of contract they are, generally speaking, "nominal." The reason for this belongs to the special subject of damages in general. In cases of wrong, or tort, especially such as libel, wrongful arrest, malicious prosecution, or assault, they are said to be "at large," and "the court may mould them to its will," as was once said. They may be remunerative, if the defendant's suffering or disgrace has been great; punitive, if the plaintiff's conduct has been outrageous, or oppressive; exemplary, if the case is such that it is desirable in the public interest to warn people that the law will vindicate wrong, and visit arbitrary conduct, when wrongful, with a heavy hand so as to deter others from attempting a repetition of it. "General damages" were once summed up in a historical, and satirical phrase, by the Boer Government in South Africa when they formulated their monetary claim against the British Government for the wrong done by the invasion of the Transvaal by Dr. Jameson's armed force, as "moral and intellectual damage." "General damages" must be pleaded as an item entirely distinct from "special damages," and must be separately claimed in a round sum, which should be fixed as the result of the calculation of two factors; (a) an amount in excess of what the pleader thinks the court is likely to award, the excess being a kind of margin of safety, and (b) a sum not exceeding the amount which the

pleader thinks it prudent to fix for the purpose of the jurisdiction of the Court selected for the suit, and for the purpose of the *advalorem* court fee which the plaintiff will have to pay on the institution of the suit. In special cases, the court, moulding the damages to its will, should allow an amendment of the claim for "general damages" to adjust it to the amount which it holds to be proper to award.

(H) "That the suit may be dismissed with costs."

This is a simple, superfluous, and apparently harmless plea. But rightly regarded, is it really harmless? It is, no doubt, so idle and meaningless that no one would desire that it should be struck out from the defence. It is not in the least embarrassing. But it possesses the vices of most of the forms of bad pleading. It is superfluous, and therefore prolix. It pleads law, because if a suit fails for want of proof, or on any ground raised in defence, it is the legal duty of the court to dismiss it. Further, it is not a statement of a material fact, and it pleads in relation to costs which is always unnecessary. So that in the real sense it is not harmless. It offends against the canons of pleading, and must be the work of a pleader who has failed to grasp the principles of the art. But it appears in the majestic form of a separately numbered paragraph, and conveys a suggestion so comforting to the defendant that it may be said to recommend itself by its very inanity. It may be compared to a Jemadar, or Chaprasi, who, standing at the portals of his master's *sanctum* in an imposing costume of red and gold, may strike awe into the mind of the uninitiated, but who, on a close acquaintance, appears to contain no more in him than a punkah soolie. So

that it is not only superfluous, but also an impostor, and anything like an imposture in the law is harmful. And rearing its head like an attractive weed which has been mistaken for a plant, it stands as a kind of exemplar of sound pleading, which those who cannot think for themselves copy, merely because they have seen it used by others, not knowing in the least why they want it. And so by its very presence it proclaims itself as a piece of good pleading, and throws out its challenge to the profession to object to it if it can, all the while carrying on its meretricious work of setting a bad example.

In conclusion, avoid any kind of obscurity. For this purpose, give the names of persons and places accurately. Avoid using pronouns. "He" is often ambiguous. Repeat "the plaintiff," or "the defendant," or "the said Peary Lal," even at the risk of appearing pedantic, and laborious, whenever there is the least risk of ambiguity. For the same reason, it is better to avoid the use of relative sentences, and relative pronouns. Change of phraseology in the course of the same pleading should also be avoided. Precision is the important point. It has been well said that "a change of phrase suggests a change of meaning," so that if you have to quote from a document, or from the section of an Act, do not attempt to improve upon it, but quote the words upon which you rely. If you are referring to a "deed of transfer," continue to refer to it as "the said deed"; do not suddenly turn round and call it a "deed of sale."

Do not try to be clever, or to write as though you wished to be thought eloquent or learned. Be simple,

short and positive Adopt short sentences in the indicative mood. Avoid circumlocution, and periphrasis. Do not beat about the bush. Allege facts boldly, and plainly, and as has been already said, however painful and discreditable they may be, without superfluous epithets, or abuse. A wrongful act is sufficiently described as "wrongful;" matters of aggravation are matters of evidence. A dishonest act is "fraud," or "deceit"; an untruth, or a lie, is a "fraudulent misrepresentation"; it is not necessary to say more, except to state the fact and give particulars of it. Finally, don't jumble up your dates; the only way to tell a long and complicated story is to preserve strict chronological order; in any case, it produces lucidity and simplicity.

CHAPTER IV

Order VI, Rule 2, illustrated

- The fundamental principles of pleading are laid down in this rule which says :—

“ Every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved.”

From this the following propositions are deducible :—

- I. All material facts must be pleaded.
- II. They must be pleaded concisely.
- III. Only material facts may be pleaded, and therefore (a) evidence and (b) matters of law ought not to be pleaded.

I. What facts are material ?

The answer to this question must in each case be sought in the substantive law which applies to it. As a general rule it may be said that every fact which is vital to the plaintiff's case—every fact which he must prove—is a material fact ; and so is every fact which is an essential ingredient of a plea set up by a defendant which would, either wholly or in part, be a defence even if the plaintiff established every fact alleged in his plaint. In other words, every fact which a plaintiff “must allege in order to show a right to sue” and every fact which a defendant “must allege in order to constitute his defence” (see Order XIV, Rule 1), is a material fact. Further-

more, if either party, as he often may, puts his case on alternative grounds, any fact which is vital to any such alternative ground is a material fact. It may not, however, be easy in some cases to be certain whether a particular fact is material or not, and in such cases it is safer to plead it. It is better to make a superfluous averment than to fail because a necessary one has been omitted. The principle may be stated thus :—Every fact which is necessary in order to bring his case within the operation of the rule of law, whether statutory or not, on which a litigant intends to rely is a material fact. A court cannot begin by assuming facts—even in those cases in which the law permits or directs a judge to make a presumption, he cannot do so till the facts upon which it ought to be based have been established ; and therefore the plaintiff will have to plead every fact which, in a normal case, would entitle him to judgment. If those facts were established, the court could not assume that there was anything abnormal in the case—any unusual or additional fact which, if proved, would disentitle the plaintiff to judgment—therefore the defendant would have to plead any such fact. No one need plead any fact which the law will presume in his favour ; and so, if a pleader is in doubt about the materiality of any fact, he will often be able to solve the difficulty by asking himself if the law would require his client to prove the fact, or, without waiting for any proof of it, would require the other side to disprove it. The principle is the same as that which underlies the rules which determine the burden of proof ; and a strict adherence to it will in some cases result in putting the plaintiff in

a position in which he ought to deliver a reply ; but that is a matter which will be dealt with in a later chapter.

Illustrations.

1. In a suit to recover damages for breach of contract, the plaintiff will have to plead offer and acceptance, consideration, breach of the contract by the defendant and loss to the plaintiff as a consequence of the defendant's refusal or neglect to perform the contract. A court could not assume any of these facts, but they would in an ordinary case entitle the plaintiff to judgment. If the defendant wishes to prove that there was some additional, extraordinary fact, *e.g.*, that he was induced to contract by the fraud of the plaintiff, he will have to plead it, for the court cannot assume that there was fraud. Even if the defendant succeeded in establishing fraud the plaintiff might have an answer to it and then it would be a proper case for delivering a reply, *e.g.*, that the defendant had elected to affirm the contract after the truth had come to his knowledge. Such an averment ought not to appear in a plea, because, at that stage, the plaintiff cannot tell whether the defendant intends to set up the defence of fraud or not. He may have quite another answer to the claim.

2. In a suit against a judge for acting without jurisdiction, it is necessary to aver that he had no reasonable or probable cause for believing that he had jurisdiction : *Girdhari Lal Dayal Das v. Jagannath Girdharibhai*, 10 Bom. H. C. R. 182 ; *Pralhad Mahardura v. Watt*, 10 Bom. H. C. R., 346.

3. In a suit upon a contract, if the defendant intends to rely on the illegality of the consideration, he must raise that defence specifically in his pleading ; *Fenwick v. Laycock*, 1 Q. B., 414.

The following are some applications of this principle :—

(a) Wherever the law only imposes a liability upon a party if he has notice of a fact, it is necessary to plead that he had notice.

Illustration.

If the plaintiff intends to claim special damages for breach of a contract, he must plead that the defendant had, at the time

when the contract was made, notice of the peculiar circumstances in consequence of which the plaintiff would incur an unusual loss if the contract were not punctually performed.

(b) Wherever there is an exception to a general legal rule every fact which will bring a case within the exception, or which will prevent the exception from applying, will be material.

Illustrations.

1. When a Hindu widow sues for maintenance, it is necessary for the defendant to plead any fact, such as unchastity, which would disentitle her to maintenance. It is not sufficient merely to plead "the plaintiff is not entitled to maintenance": *Haji Sahoo Sidick v. Ayeshabai*, I. L. R., 27 Bom., 485 (P. C.).

2. Where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaintiff shall show the ground upon which exemption from such law is claimed: Order VII, Rule 6.

(c) Any custom which varies the ordinary law must be pleaded.

Illustration.

1. If a plaintiff sued to pre-empt under an agreement in the *wajib-ul-arz*, he could not rely on a local custom unless he had pleaded it: *Chadami Lal v. Muhammad Buksh*, I. L. R. 1 All., 563.

(d) In cases coming under the rules of some particular school of Hindu or Muhammadan Law it would be material to plead the fact or facts which would cause those rules and not the ordinary rules of Hindu or of Muhammadan Law to apply.

Illustrations.

1. In a suit concerning the validity of a waqf which provided for the support and maintenance of the waqf during his lifetime, the fact that the waqif was a Hanafi Mussalman would be material [see the Waqif Validating Act, No. VI of 1913, S. 3 (b)] and ought therefore to be pleaded.

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2. In a suit in which the validity of an adoption of a son by a Hindu widow without her husband's authority is in dispute, the fact that the deceased husband was a Jain or was governed by the Mayukha school of Hindu Law would be material and should be pleaded.

(e) The breach of a condition precedent must be pleaded. Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant, as the case may be. Order VI, Rule 6.

II. Material facts should be pleaded concisely.

Although a pleader must state definitely the facts which he asserts and must be equally definite in his denials, he should be as brief as is consistent with clearness. He should, in the first place, avoid repetition. The custom which prevails in the United Provinces of going through a plaint paragraph by paragraph, admitting or denying one or more of the facts alleged in each paragraph frequently produces needless repetition. In a written statement of defence which recently came before the High Court at Allahabad, the death of a particular person—a fact which was common case—was solemnly admitted three times in three separate paragraphs merely because it was mentioned in three different paragraphs in the plaint. It would have been quite sufficient in this particular case to have stated in one paragraph the facts which were admitted, to have denied in a second paragraph all the other facts alleged in the plaint and then to have gone on to plead the special defences which the pleader wished to raise. It is also quite unnecessary to paraphrase the same plea in two or more paragraphs.

Illustration.

Here are three pleas from the defence mentioned above :

6. " A. B. never had an intention of making a waqf, nor did he intend to relinquish his proprietary rights during his lifetime or to deprive his heirs of their inheritance after his death

7. According to the correct interpretation of the document alleged by the plaintiff no waqf of the property was brought about by it because the waqf kept his proprietary powers in respect of the waqf property unlimited and made no definite transfer for objects of waqf. Moreover the other terms used in the document are inconsistent with a valid waqf.

8. The said A. B. never in his life took possession of the waqf property as mutawali, nor did he enforce waqf. He remained in possession of the whole property as proprietor till his death and brought the profits of property to his private use "

Without discussing the exact nature of the defence which appears to have been intended, it may be said all three pleas came to very much the same thing and could easily have been compressed into one paragraph :—

" The said A. B. never intended to create a waqf by the deed of 16th April, 1906. The said deed did not in any way restrict his power of dealing with or disposing of the property comprised in it, and from the 16th April, 1909, down to the date of his death the said A. B. managed and dealt with the property as his own and did not apply any part of it to the purposes of the said alleged waqf."

: In the second place a pleader should avoid all unnecessary adverbs and adjectives and argumentative pleas. If the plaintiff pleads a valid title and then pleads that the defendant refuses to surrender possession, there is no use in adding that the defendant is acting " wrongly " or " fraudulently." If the plaintiff is right, then he is right and the state of the defendant's mind does not matter. If the plaintiff is wrong, then the defendant is neither " wrong " nor " fraudulent." It is equally foolish for a defendant to argue in his pleading. Inferences

of fact and conclusions of law are matters for the judge. "The alleged cause of action is entirely wrong," "The alleged waqf, if it can be called a waqf at all, is not valid under Muhammedan Law"—the only thing which a judge could do with pleas of this kind would be to strike them out or to treat them with contempt.

Besides avoiding such obvious faults there are other ways in which a skilful pleader can shorten his pleadings. (1) He can state shortly the legal effect of a document without repeating its words : Order VI, Rule 9. (2) He can, *where it is material*, plead malice, fraudulent intention, knowledge or any other condition of mind as a fact without setting out the circumstances from which such a state of mind could be inferred : Order VI, Rule 10. (3) He can plead the legal result of a set of letters or of circumstances or of a series of conversations without going through the whole story in detail : Order VI, Rule 12. (4) He need not plead any fact which the law will presume in his favour or of which the burden of proof lies on his opponent : Order VI, Rule 13 ; thus, in a suit to recover money lent, an express promise to repay the money need not be pleaded because a request for a loan implies a promise to repay it : *Pramatha Nath Sandal v. Dwarka Nath Dey*, I. L. R. 23 Cal., 851.

III. *Only material facts are to be pleaded.*

(a) Evidence should not be pleaded.

Illustrations.

1. An admission should not be pleaded : *Davy v. Garrett*, I Ch. D., 473.

2. Here is a set of entirely superfluous pleas taken from the written statement in an important suit.

" 19. The defendant... was treated as a son and was recognised as such repeatedly by the said Raja and the members of his family and his relations and other respectable persons in matters of social intercourse and by the Court of Wards when the said Court of Wards was in possession of the estate of the said Raja.

22. The defendant's mother.. in the interest of her husband the said Raja and of the defendant, their son, and of their family opposed all attempts made by interested persons in the name of the said Raja to have his estate released; which highly irritated the said Raja against her and this defendant and false and malicious allegations were made in the Raja's name against this defendant to his great prejudice.

23. The Court of Wards during its management continuously recognised the defendant as the son and heir of the said Raja and supported and maintained him and the members of his family as such; the other Government officials also recognised the defendant as son and heir of the said Raja and the Government has recognised him as the Raja and successor of the estate."

All the facts alleged in these three pleas are mere evidence. They do not more than establish, if proved, a strong inference of fact. The defendant might have failed to prove every one of them and yet won his case; or he might have proved every one of them and yet lost his case. The pleader who drew them wasted his time and it was a waste of time and of money to print them.*

(b) Conclusions of law ought not to be pleaded. Questions of law are for the judge. Each party should allege the facts upon which his case is based and leave the judge to apply the law to them. He can, if he likes, "object in point of law" (see Chapter 7),

*These three pleas remind one of the well-known case in which the defendant pleaded all kinds of evidence to show that he was an earl and had been received as an earl and had voted as an earl, etc., but the whole plea was struck out because he had omitted to plead the only material fact, namely, that he was The Earl of Sterling.

or he can, if he wants to make his meaning plain, state the facts and add that he "will contend that" a certain legal result follows, *e.g.*, he can state the exact words of a document and then state what he believes to be their legal effect, though, unless the precise words are material, as they are in defamation ; or are very important, as they may be, if ambiguous, it will be sufficient to state the effect of the document : Order VI, Rule 9 ; but a party may not merely make a legal claim and leave his opponent in doubt about the facts upon which it is based.

Illustration.

In a suit to recover damages for wrongful dismissal, a plaintiff ought not to allege merely that he was "entitled to three months' notice" and that he was dismissed without notice. He ought to plead the clause in his contract of service under which three months' notice was to be given to him ; or (if there was no such agreement) that he was entitled to reasonable notice, and that, for one in his position, three months' notice was reasonable and then claim three months' salary.

CHAPTER V.

Pleading in the Alternative

Two general observations on this subject may be made as a preliminary to the discussion of special points. In the first place, unless there is some real necessity, the use of alternative, and still more of inconsistent allegations, besides leading to waste of time and adding to the expense of litigation, looks weak. It is apt to suggest that the plaintiff or defendant, as the case may be, is not sure of his ground and is merely striking blindly in the hope that some blow will get home. Secondly, if, as may be the case, a party finds it advisable to have recourse to the expedient, he must plead each ground of attack or of defence and the material facts on which it is based separately and distinctly. He must not throw a confused mass of facts at his opponent's head and leave the latter to guess the uses to which they will be put at the trial. "Either party to litigation may in a proper case include in his pleading two or more inconsistent sets of material facts and claim relief thereunder in the alternative; but whenever such alternative cases are alleged the facts belonging to them respectively should not be mixed up; but should be stated separately so as to show on what facts each alternative relief is claimed": *Official Receiver of Bengal v. Bidya Sundari Dasi*, 24 C. W. N., 145. The passage quoted reproduces in substance the remarks of Thesiger, L. J., in *Davy v. Garrett*, 7 Ch. D. at p. 489.

Illustrations.

1. The plaintiff sued to have certain transfers made by his mother, an old lady named Khaja Boo, set aside and pleaded as follows :—

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"At the date of the execution of the said document the said Khaja Boo was suffering from *dementia* and was not in a fit state of mind to execute contracts or to manage her affairs, and up to the month of July, 1908 the defendant was residing with the said Khaja Boo, who was entirely under his dominion and control and the defendant was wellaware of the mental condition of the said Khaja Boo."

On appeal to the Privy Council the Court said that, notwithstanding the statement that Khaja Boo was entirely under "the dominion and control," of the defendant, this paragraph only amounted to an averment of unsoundness of mind; and that, if the plaintiff had wanted to make an alternative case of undue influence, he ought to have pleaded that separately: *Ismail Mussojee v. Hafiz Boo*, 1. L. R., 38 Cal, 773.

2. If a plaintiff pleads fraud and fraud only, and does not ask for relief on any other ground, and fails to prove fraud, it is not open to him to pick out from the allegations in the plaint certain facts which might, if not pleaded as proofs of fraud, have entitled him to ask for relief on another ground: because "a defendant is not bound to do more than answer the case in the mode in which it is put forward": *Rajendra Kumar Bose v. Gangaram Koyal*, 1. L. R., 37 Cal., 856.

Various cases occur in which questions of this kind may arise and it is better, for the sake of clearness to discuss them separately.

1. A party may be in a position to say, "I am entitled to succeed on two or more distinct grounds which are perfectly consistent with each other, so that, in proving one, I do not disprove the other." In such a case it is clearly permissible to plead in the alternative.

Illustrations

1. In a suit to enforce an alleged right of pre-emption a plaintiff could, if the facts permitted, rely on three alternatives, viz, that he was entitled to pre-empt (a) under Mohammedan Law and (b) by custom and (c) under a contract embodied in the *Wajib-ul-arz*: *Chadami Lal v. Muhammad Baksh*, 1. L. R. 1 All., 563; *Maraftib Ali v. Abdul Hakim*, 1. L. R. 1 All., 567.

2. In a recent suit to restrain the defendant from interfering with an easement to discharge water from the plaintiff's on to the defendant's land, the plaintiff lost his case in the Allahabad High Court because he had omitted to plead alternatively that his land was on a higher level than the defendant's and that the latter was interfering with his right to discharge surface water on to the defendant's land; see the Easements Act, S 7, ill. (i).

3. A plaintiff suing for a declaration that a mortgage bond was void could plead (a) that the document was forged and (b) that there was no consideration for it, because the fact of forgery would be perfectly consistent with the fact that the forger did not give consideration, and the fact the plaintiff got nothing from the defendant would be quite consistent with the fact that the plaintiff did not mortgage his property to the defendant. In *Jino v. Manon*, I. L. R. 18 All., 125, similar averments were allowed, though the court, on the peculiar facts of the case, thought them inconsistent.

II. A plaintiff may say, consistently enough, "I believe I am entitled to this relief and on this ground, but, even if the court decides that my proof falls short of my whole case, still I am entitled to some relief though my rights may not be exactly what I think they are."

Illustrations.

1. A plaintiff may say (1) "I am owner of this land and the defendant is interfering with my possession (2) Even if I am not owner and the defendant is, I have an easement over the land and the acts of the defendant amount to an interference with my easement". *Narendra Nath Barari v. Abhoy Charun Chattopadhyaya*, I. L. R. Cal. 51, *Dharamdas v. Ranchhodji*, I. L. R. 46 Bom., 200

2. A plaintiff claiming land from a defendant could plead (1) that a certain document was a forgery and the defendant could not take under it (2) that if the document was genuine the defendant was entitled only to 2/3rds and that the plaintiff was entitled to the remainder of the land: *Mohendra Nath v. Kali Froshad*, I. L. R. 30 Cal., at p. 278.

3. A member of a Hindu family may sue either for a share under a partition which he believes to have been made or alter-

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natively for a decree for partition : *Ningappa v. Shivappa*, I. L. R. 19 Bom, 523.

III. A plaintiff may say, " I am not certain what the defendant's case will be, but I am ready to meet him on any ground he chooses."

Illustration.

A plaintiff in ejectment could plead that the defendant was his tenant and ask for a decree in ejectment for non-payment of rent, etc., and plead alternatively that, if there was no tenancy, the defendant was a trespasser and ask for a decree in ejectment on the title, etc ; but if he does this he must plead his title : *Lakshmi Bai v. Hari*, 9 Bom. H. C. R., 1.

IV. A litigant may put his case in this way :—
" With my present knowledge of the facts I cannot be sure which of two views is the right one but I say that one or other of two things happened, and whichever it may turn out to be, I am entitled to judgment in my favour. "

In a well-known case, *In re Morgan*, 35 Ch. D., 492, Lord Justice Lindley sympathetically explained the difficulty of a litigant who finds himself in such a predicament. His Lordship said :—" Now a person may rely on one set of facts if he can succeed in proving them and he may rely upon another set of facts if he can succeed in proving them ; and it appears to me to be far too strict a construction of this order " (Order XIX, Rule 4, which is the same as Order VI, Rule 2 of the Code of Civil Procedure) :—" to say that he must make up his mind on which particular line he will put his case, when perhaps he is very much in the dark." In that case the executors of a wife had sued the executor of her husband to recover £6,000 alleged to have been received by the husband ;

as trustee for the wife for her separate use. The defendant put in the following pleas :—(1) a denial that the husband had ever received the money, (2) a denial that he had received it as a trustee for, or had promised to repay it to, the wife, (3) “alternatively” that, if he had received it, he had repaid it to the wife, (4) “alternatively” that, if he had received it, the wife had authorised him to retain it as a gift from her, (5) “alternatively” that, if he had received it, the wife had agreed that he should retain it in part payment of rents which were due to him, but which she had received and retained, *i. e.*, “accord and satisfaction,” (6) “alternatively” that, if he had received it, the wife was at the time of her death indebted to the husband and her estate was still indebted to his for a sum equal to the plaintiff’s claim, which sum the defendant was willing to set off. The particulars of the wife’s alleged indebtedness were given in the counterclaim, (7) a plea of limitation and (8) another of laches and delay. Finally, in the event of the defendant being successful upon any plea other than the 6th, *i. e.*, set off, the defendant counterclaimed for the sum named in that plea and gave particulars of the items comprising it. The plaintiff objected to the combination of the 3rd, 4th, 5th and 6th pleas, *i. e.*, “repayment,” “gift,” “accord and satisfaction,” and “set off,”—but only to those four as embarrassing, and the Court of Appeal, Lindley and Bowen, L. JJ., gave the defendant the option of either amending his pleading or of giving particulars of the four pleas in question within fourteen days after getting discovery of documents from the plaintiff. There is a passage in the judg-

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ment of Lindley, L. J., which shows that he did not think that alternative pleas of payment and set-off would be embarrassing ; and, from the choice left to the defendant of giving particulars of all the pleas, it is clear that the court thought that they could all be used as alternatives if the defendant gave particulars of the transactions upon which they were founded, *i. e.*, if they were not mere efforts of the defendant's imagination.

Illustrations.

1. If a plaintiff cannot be sure which of two defendants is liable to him, he may certainly make alternative cases against each of them, thus he can sue defendant A for breach of a contract of sale made by the plaintiff with defendant B and allege that B made the contract as agent for A ; and he can alternatively sue B for breach of warranty of authority to make the contract on A's behalf. This is a case in which it is very desirable to sue in the alternative, because a decision in a suit against the principal alone that the agent had exceeded his authority would not estop the agent, if he were sued separately, from proving that his authority had not been restricted in the way alleged by his principal (the defendant on the first suit).

2. A plaintiff can sue on the contract in a bond given to secure a loan and alternatively on the original consideration. *i. e.*, to recover "money lent to the defendant," a promise to repay being implied.

3. A party might plead (1) that he never signed a document at all, *i. e.*, forgery, or alternatively, (2) that, if he did sign it, he did so without negligence and under the mistaken belief that it was a document of a totally different nature, see *Lewis v. Clay*, 77 L. T. 653, where a young man was induced to sign a joint and several promissory note under the belief that he was witnessing the signature of the other promisor, the latter having covered the rest of the paper and told Clay that the document was one relating to his private family affairs. The judgment in *Iyyappa v. Ramalakshamma*, 1. L. R. 13 Mad., 549, seems to be against this, but the report does not show clearly whether the plaintiff's case was that she was completely deceived concerning the nature of the document which she was signing (Mistake) or

whether her case was that she signed the document knowing its nature, i.e., that it was a "sale-deed," but being fraudulently misled concerning its exact effect or the necessity for executing it (Fraud). In the former case the plaintiff might not be sure whether she had signed the document or not; in the latter, she could not be in doubt.

4. A son suing to set aside a deed of gift by his mother to the defendant could plead (1) that at the date of the deed his mother was of unsound mind and the defendant knew it, (2) alternatively that the defendant procured the execution of the deed by undue influence. Their Lordships of the Privy Council do not, one gathers, see anything wrong in this. see *Ismail Mussajee v. Hafis Boo*, I. L. R. 33 Cal., 773.

The evidence on each issue would to some extent corroborate that on the other; since a person of weak mind is easily influenced, and the fact that a person is easily influenced is some evidence that he is of weak intellect.

5 Children suing to set aside an alleged deed of gift by their father to a more remote relative could, it is submitted, take up the following position:—"Our parent was at the date when he executed this document under the influence of the defendant. We believe that the defendant forged this deed, but, even if he did not, we can show that he had, and exercised, such domination over our father that the deed ought to be set aside on the ground of undue influence."

Here the alternative allegations would weaken each other. If the defendant had so much influence, why should he have resorted to the dangerous expedient of forgery, especially when the deed, even if the forgery were not detected, could still be challenged on the ground of undue influence? If the defendant did forge the document, then he cannot have had much faith in his power over the plaintiff's father:

V. May a plaintiff put in two or more inconsistent pleas when the truth must inevitably be known to him? e. g., would it be permissible for a plaintiff in a suit to have a deed set aside to plead (1) that he never signed it at all, i.e., that his alleged signature was forged and (2) that he signed the deed under undue influence exercised over him by the defendant? There can be no doubt that it would

be exceedingly foolish to do so ; but ought a court to force a plaintiff to elect which allegation should be struck out? A bench of the Allahabad High Court said, "no," in *Jiro v. Manon*, I. L. R., 18 All. 125, on the ground that the court is not bound to prevent a plaintiff from prejudicing his own case, though it ought to see that he does not embarrass the defendant. [In the example taken, the defendant would not be embarrassed at all ; because he could quite logically deny both averments :—" You did sign the deed, and you signed it without any pressure being put on you."] The opposite view was taken by the Madras High Court in *Iyyappa v. Ramalakshamma*, I. L. R. 13 Mad., 549. The two courts differed concerning the effect of the Privy Council's decision in *Mahomed Buksh Khan v Hosseini Bibi*, I. L. R. 15 Cal., 684*, I. L. R. 15 I. A., 81, where the original plaintiff had in her plaint pleaded forgery and nothing else ; and the trial court, after her death, at the instance of her successors framed and tried an issue whether the deed in dispute has been executed under undue influence or not. The Privy Council said that this issue ought not to have been admitted since it was " absolutely inconsistent with the case made by the plaintiff." But this only amounts to a statement that a court ought not to frame an issue which is inconsistent with the pleadings, especially when the issue is suggested by a substituted party whose knowledge of the facts cannot be as intimate as the person in whose shoes he stands and who not only did not put forward such a case ; but, inferentially, said that it was untrue. It is

* The head-note in this report of the case misrepresents the facts.

quite another thing to say that it is the duty of a court to save a plaintiff from himself by forcing him to abandon a contradiction which can only have the effect of prejudicing, if not of ruining, his case. It is, therefore, submitted that, as far as inconsistency is concerned, a party may contradict himself in his pleading as much as he pleases, as long as the facts on which every alternative is based are definitely stated and it is possible for the other party to deny all the alternatives without being forced into an inconsistency. The use of inconsistent allegations is, however, more easy for a defendant than for a plaintiff to justify. The latter ought to know his case and be sure of his ground before starting a suit.

CHAPTER VI.

The Complaint or Statement of Claim.

The Civil Procedure Code prescribes in Order VII, Rule 1, the particulars which the plaint must contain, and every pleader should know these by heart. They are the framework into which his statement of the case has to be fitted. They may be classified under three heads.

A

Those which disclose the competency of the court in which the suit is brought.

1. The name of the court.
2. The name and residence of the plaintiff.
3. The name and residence of the defendant.
4. Facts showing the jurisdiction of the court.
5. The valuation of the subject-matter.

B

6. The facts constituting the cause of action.
7. Any special status of both plaintiff and defendant, where, for example, either is a minor, or of unsound mind.
8. The date when the cause of action first arose.

C

9. The relief claimed.
10. A clear statement of any amount which the plaintiff allows to be set-off against his claim, or of any portion of his claim which he has relinquished.

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In the first place the pleader should be careful to state the nature of the plaintiff's interest in every case in which he sues in a representative character. This is of the utmost importance where the plaintiff sues as a member of the public, for example, in assertion of a public right to a road, or well, or any water, whether alleged to belong to the inhabitants of a *mohalla*, or of a township, or to the public at large. It is also of special importance in all cases in which the plaintiff is suing as a member of some religious body, on behalf of himself and other members, in respect of some alleged breach of trust. It is frequently of fundamental importance to ascertain whether the plaintiff's suit really relates to a public, or to a private trust. The determination of the question whether a trust is in fact a public, or a private one, is in itself often one of difficulty. But there should never be room in the plaint for doubt as to the character in which the suit is brought, or as to the nature of the trust in respect of which the plaintiff is suing. A suit relating to a public trust brought under section 92 of the Code of Civil Procedure, must either be instituted by the Advocate-General, or in Provinces where there is no such official by the Legal Remembrancer, or other person performing the official duties of the Advocate-General, or else by two or more persons having an interest in the trust, who have obtained the consent in writing of the Advocate-General, or Legal Remembrancer, as the case may be. Order VII, rule 4, requires the plaintiff to "show not only that he has an actual existing interest in the subject-matter, but, that he has taken the steps necessary to enable him to institute, a suit

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concerning it " The plaint must, therefore, state that the consent in writing has been obtained, and must give the date and substance thereof.

Turning next to the question of the proper parties to a suit, the plaintiff's pleader must, of course, as one of his earliest preliminary tasks, make up his mind as to who the proper parties are. This decision may be vital to the success of the suit, and a mistake will certainly embarrass and delay the trial of the suit, even if it does not altogether destroy the plaintiff's chances of success. There are, perhaps, few branches of the art of pleading which are more important than this, and in which a sound knowledge of law, and a "right judgment" in all things, are more essential, for the reason just given. It is of exceptional importance in India for two reasons peculiar to the country. The large number of persons who have to be joined on account of the joint family system amongst Hindus, the fractional division of property amongst Mahomedans, and the astounding prolongation and complication of mortgage transactions, which seem to be characteristic of, and inseparable from, Indian social life, creates problems about joinder in a large proportion of suits, and in a smaller quantity involves knotty questions. Secondly, the tempting and sometimes invaluable solution, when the pleader is in serious doubt as to whom to join, of bringing separate suits in respect of the same subject-matter against different persons, and then having them consolidated and heard as one, is rendered difficult in the lower courts by what seems to us the unfortunate omission from the Code of any express-provision for consolidation. But in any case,

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the decision which has to be made about the proper joinder of parties, frequently involves the decision of some point of substantive law, and the many points which have arisen under Order I, and particularly under Rule 1 of that Order, seem to be worthy of separate treatment. The general rules as to what parties shall be joined are to be found in Order I, and the pleader should make a regular practice of studying these rules, and of deciding how they apply to the facts of his own case, before he comes to a final decision, and starts upon his draft. In many cases the task will be simple and straightforward, but he should never allow himself, from a feeling of over-confidence, to neglect this piece of advice, but should rather cultivate the practice until it becomes an absolute habit. Rule 8 of Order I should be carefully studied in all cases in which numerous persons having the same interest in one suit desire to sue, or to defend. A familiar instance of this sort of thing, which is analogous to a suit under section 92 of the Code in relation to a public trust, dealt with above, occurs when the members of a community are beneficiaries in the enjoyment of some right in the nature of a private trust. For example, the members of a religious body in a particular locality may possess a well which belongs to them in common as such members, to the exclusion of all non-members, and a dispute may arise between the members, and the general public, or between factions of the body itself. It would be obviously cumbrous, and inconvenient, and where an internal dispute prevailed it would be impossible, that every individual beneficiary should join as a plaintiff. Order I, Rule 8, provides for what is some-

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times called a "representation order." To enable this procedure to be adopted, a judicial order of the court is necessary. One person is enough, unless there are practical reasons of convenience amongst the beneficiaries themselves for choosing more. The one or more persons may, of course, sue in their individual capacity in respect of any right which gives them a cause of action. The only consequence is that their suit never acquires a representative capacity. The rule creates no right, and only deals with procedure. It seems superfluous to dwell upon this, but there is no end to the ingenuity which will seek to raise objections to any rule of procedure, or, indeed, of anything else, and there are reported cases on the point. The rule does not give a cause of action. But where its procedure is adopted, the result of the suit binds those persons on behalf of whom, or for the benefit of whom, it has been brought, or defended. The application for permission ought to be made before the suit is instituted, and the result of the application and the capacity in which the plaintiff sues must, as already explained, be set out in the plaint. It was at one time held that, unless the permission were obtained before the suit was brought, the suit ought to be dismissed. But the better opinion is that the defect may be cured at any time. This seems reasonable, as the important, almost the only, object is that the persons interested shall be affected and bound by the decree, just as though they were parties. In effect, they are parties, because they are represented and have consented to it. This result is achieved by the court giving notice of the institution of the suit to all persons concerned, at the plaintiff's

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expense. 'The plaintiff should, however, see to it that the notices have been given, and have reached the parties. The duty of giving notice being thrown on the court, the plaintiff is apt to relax his efforts, and to neglect to satisfy himself with the result that subsequent trouble arises from pettifogging disputes as to whether personal service has been effected by the court. This seems inevitable in India where many duties more appropriately carried out by the party interested are assigned to the Court. But unless notice has been served, no one whom it has not reached can be bound ; the object of the notice is for the very purpose of enabling every one whom the proposed plaintiff wishes to represent to apply to the court to be allowed to come in, and be made a party, so that he may be heard to support or to object to, if he so desires, the claim made in the suit. This is a natural, and inalienable, right of every member of a community who is entitled to some interest enjoyed in common with the general body of such community, especially when such right has been threatened, or is being used by the proposed plaintiff and his friends, for some purpose of their own.

It is hardly necessary to observe that, in this matter of parties, as in almost every matter of litigation, where the object is to decide the right, to end the wrong, and to make an order finally determining the rights of the parties, the court has full power, if properly moved for the purpose, of correcting any mistake, and of allowing amendments, to repair omissions and remove errors, on proper terms including the payment of costs by the party originally in fault. Full provision for this is made in Rule 10 of

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Order I. But the existence of such provision, instead of inducing carelessness due to the confident hope that its consequences can be overcome, ought to make the pleader exceptionally careful. Not merely because it is a cause of shame to have to come before the Court, in the presence of both parties, to repair something which is due to his own slovenly work ; but because the fundamental idea of pleading is that the suit should be clearly, accurately, and fully framed from its inception. The Court does not sit as a disciplinary tribunal to deprive parties of their rights because they have made mistakes. But it does insist that the rules which have been made for the guidance of the pleader shall be strictly carried out, and that no mistake shall be subsequently corrected, except with its permission, in the presence of the parties, and on the application and at the expense of the guilty party. The question of penalties for mistakes, and negligence, will be discussed in more detail in the chapter on the " Duties of Parties."

The facts constituting the cause of action should be clearly and methodically arranged. A plaint, if properly drawn, should resemble the synopsis of a tragedy, that is to say, it should state in a way which will be easily intelligible to a reader who has no previous acquaintance with all the facts of the case—and only the facts—which, assuming that the pleader's view of the law is correct, will inevitably, if those facts are proved and if no additional facts are proved by the defendant, lead to the catastrophe which (the plaintiff hopes) awaits the defendant. In other words the plaint should be such that, if all the facts alleged in it were proved, and if nothing more were

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proved, the Judge would, under the law which applies—or which (if the point raised by the case is a new one) the pleader thinks ought to apply—to the case, be wrong in his law if he did not give a decree for the plaintiff. Therefore :—

I. The plaint ought to be as intelligible as possible to one who has no previous acquaintance with the facts. In the first place it is desirable to state who the parties are ; and when any other person is mentioned it is equally desirable to show who he was or is, and what he had or has to do with the story. These explanatory statements, or “ matters of inducement ” as they are called by English lawyers, ought to be as short as is consistent with clearness. When there are, as there usually are in cases in which the property of a Hindu or of a Muhammadan is in dispute, a large number of defendants it is useful to state how they are connected with each other and with the person whose property is claimed. After the characters of the dramā have been stated, the next thing is to summarise the plot. Events should be stated as far as possible in chronological order with dates ; and, if the pleader cannot give exact dates, he should at least take care to make it clear whether one event happened before or after another. Places and things should be indicated or described with reasonable precision ; and facts, unless closely connected together, should be stated in separate paragraphs, so that the pleader—and the defendant's pleader—can refer to “ the facts stated in paragraph ” without having to particularise further. Persons should always be called by the same name. It is a mistake to call the same person first “ Lālā

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Qadir Shah", then "the said Lala Sahib," and finally "the plaintiff's father."

Let the pleader banish from his mind his own knowledge of the facts and then read the plaint through, asking himself if it conveys a clear and distinct idea of his case.

II. The plaint should state all the material facts of the plaintiff's case or alternative cases. The question, what facts are material, has been already discussed. Having made up his mind about the rule of law which applies, or which he thinks ought to apply, to the case, let the pleader read his plaint again and ask himself if the judge would be bound, on that view of the law, to decide in favour of the plaintiff, if the facts alleged in the plaint and no additional facts were established.

III. There ought not to be any superfluous averment; so let the pleader ask himself if the judge could decide in the plaintiff's favour even if some of the allegations of fact in the plaint were not proved. If so, these allegations should be omitted, unless they are required to explain or to show the connection between other statements, or unless the plaintiff has made alternative cases based on different facts.

IV. Every fact should be stated in such a way as to force the defendant either to admit or to deny it. A defendant is forbidden to plead evasively; but that is no reason why the plaintiff's pleader should give him an excuse for doing so. Therefore, in pleading a pedigree or in tracing a title, every step in the descent or in the devolution of the title should be stated as a separate and independent fact.

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V. The plaintiff need not anticipate the "written statement of defence". It must be admitted that in India, where a reply cannot be delivered without leave, a pleader is greatly tempted to plead his answer to facts which he thinks will be put forward by the defendant; and that in one case, under Order VII, Rule 6, the plaintiff is required to do so; but, even so, it is far better for the plaintiff not to "jump before he comes to the stile." Let him wait till he knows what the defence is, and then, if he thinks it is necessary, get leave to put in a reply.

VI. If the plaintiff wishes to put his case on alternative grounds, he must plead all of them in the plaint. He must not put his case in his reply on any grounds which are not expressly advanced in his plaint. To do so would amount to a "departure in pleading," which is forbidden by Order VI, Rule 7.

Where, under number 9 of the items given on page 72 the relief claimed involves a detailed description of land, houses, buildings and the like, these should be placed in a schedule, or appendix, to the pleading, at the foot thereof, with a reference to such schedule, or appendix, in the body of the claim for relief. The importance of ascertaining all particulars, especially in the case of houses and land, so as to show the area, and boundaries, and to make identification simple, before you start, and of stating them in unmistakable terms, cannot be too strongly enforced. If this is not done mistakes and misunderstandings are certain to arise. Such mistakes are liable to be overlooked in the discussion of weightier matters at the hearing, and so they creep into the decree. Mistakes of this kind will, in every case, involve an application

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for an amendment of the decree, causing, in most cases, much trouble and difficulty, and in some instances miscarriage of justice. An accidental omission in the plaint, due to lack of sufficient care in the initial preparation of the schedule, may be held in some cases to amount to a relinquishment of that part of the case. An attempt to repair the omission after the trial by an application to amend may be rejected, or if allowed, may involve a partial re-hearing, if the plaintiff's right to the portion omitted is seriously disputed, the whole cost of which ought to be borne in any event by the plaintiff. An excessive claim ought equally to be avoided. It may be the fault of the defendant if attention is not drawn to it at the hearing, in order to have it finally disposed of, but where its inclusion has been *bonafide* overlooked, so that the parties have to be brought again before the court on an application to amend, there is always the possibility that the plaintiff may be charged and convicted of having wilfully claimed too much in the hope of recovering, without the excess being noticed, a decree for more than he is entitled to, and where this is established against him the court will have absolute discretion to penalize him in costs, or to deprive him of the costs of the suit.

The duty of specifying the amount of any money claim, and a description of the immovable property sufficient to enable it to be identified, is definitely prescribed by Order VII which deals with plaints. The necessity for doing so is obvious. As a matter of business, no sensible pleader would neglect to do it, and a pleader ought to be a man of business, for no man without a sense of business can hope to

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do much as a lawyer. A tradesman might as well send a letter to a customer demanding payment of his bill, without either enclosing the account, or stating the amount due, as a pleader send out a plaint without a clear specification of the claim. He would probably specify the claim with precision, even if he had never read the First Schedule to the Code. But it is well to remember that a mandate on the subject is contained in Rules 2 and 3 of Order VII.

The pleader should, in every case where it is possible, irrespective of any other view, protect his client against the possible consequences of his foolish roguery, by suing in the alternative on the original consideration of any express contract, bond, or promissory note upon which a claim is being made. This injunction is really elementary and obvious. And yet in a country like India, in which certain classes of society are reckless about manufacturing documents and *parol* evidence to support them bolstering up an honest case with dishonest evidence because they fear that the simple truth will not be believed, or because they have accustomed themselves to regard it as dangerous, this necessary precaution is often neglected. One simple example will suffice. If the pleader does not learn the principle from this example, the multiplication of cases will not teach it to him. It occurred in a second appeal which is unreported because it involved a simple question of fact. The plaintiff alleged that he had lent Rs. 500 to the defendant who had executed a *sarkhat* agreeing to repay the principal with interest at Rs. 1-8-0 per cent. per mensem. Both courts held that, the *sarkhat* was a forgery, and dismissed the suit. The

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second court had expressed a doubt as to whether the plaintiff's books could be relied upon. As he was either a forger, or the utterer of a forged document, this is not surprising. But the language used in both courts seemed to indicate that it was the opinion of every one that the plaintiff had advanced the money, or some money, and that the defendant owed the plaintiff the amount of the loan, whatever it was. As the plaintiff's case on the wretched forgery broke down, there could be no claim for interest or any other matter for which the express contract in writing had provided. But a simple loan involves an undertaking by the borrower to repay the amount in every case, and particularly where no express contract to do so is entered into. If the plaintiff had claimed in the alternative the repayment of the loan, the Court of Appeal would have been compelled to decree the amount of the advance actually made, whatever that was. The Court was asked to do so, but refused, upon the ground that there was no claim for it in the plaint, that the courts below had never been asked to decide the question, and that it would not be just to allow an amendment of the plaint, even on the terms of making the plaintiff pay the whole costs of both sides in his unsuccessful suit up to that moment, because the defendant had had no notice of the claim, and might have been able to meet it by other evidence which he had not called. The probability that the claim for the loan was statute-barred would probably be, in most cases, another reason for refusing an amendment. But in any case it must be a rare thing for a court of appeal to allow to an unsuccessful appellant an amendment raising a new ground for the

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first time. It would certainly never do so in such a simple and common case as a forged *sarkhat*. Here one may say that the plaintiff was a knave, and his pleader a fool. The combination is seldom a success.

The example may be conveniently illustrated by parallel columns, A showing the proper form of relief, and B the relief as actually claimed :—

A.

B.

The plaintiff claims.

Hence the plaintiff prays for the following relief :—

- (a) A decree for Rs. 777-8-0, principal and interest due on the *sarkhat*, up to the date of the decree, and thereafter interest at the court rate until payment.
- (b) In the alternative, repayment of the amount advanced by the plaintiff to the defendant.

- (a) A decree awarding Rs. 777-8-0, on account of principal, interest and penalty on the *sarkhat*, as per account given below, may together with the costs of the suit and *pendente lite* and future interest be passed in favour of the plaintiff against the person and property of the defendant.

The defendant in this case was actually foolish enough to deny that any money was advanced at all, but no issue was struck on this question ! As to this type of error the reader will find some observations in the Chapter "What to avoid."

CHAPTER VII.

The Written Statement of Defence.

Under Order VIII a defendant can adopt either or both of two methods of answering the plaint :— he can “ traverse,” *i. e.*, deny, all or any of the facts alleged in it ; and he can “ confess and avoid,” that is, he can, while admitting all or any of those facts, plead additional facts which would constitute a defence even if the whole of the facts alleged in the plaint were proved ; but these two grounds of defence must be alleged, “ as far as may be, separately and distinctly.” Order VIII, Rule 7. The *onus* of deciding whether the plaint does or does not disclose a cause of action is cast on the Judge in whose court it is filed : Order VII, Rule 11 ; so there is no reason why the defendant should trouble himself to “ object in point of law,” though there does not seem to be any harm in his doing so if he thinks that he can thereby make his meaning clearer ; and, of course, if the plaintiff, instead of quoting the words of a document, has pleaded what he believes to be their legal effect, the defendant, unless he agrees with the plaintiff's version, ought either to give his own or to plead that he does not admit that the plaintiff's interpretation is correct. Even under the English rules, which expressly allow any party “ to raise by his pleading any point of law,” it is permissible to raise at the trial a point of law which has not been pleaded *provided* that all the material *facts* upon which the point depends have been pleaded.

Little need be said about admitting facts. It is easy to do this. The only thing that a pleader need bear in mind is that, if he admits a fact, he may thereby deprive his client of the opportunity of cross-examining witnesses who would otherwise have had to be produced to prove it. "Traversing" is a much more important matter. It is usual to plead that the defendant, "does not admit" facts which he wishes to force the defendant to prove or about which he is in doubt; and that "he denies" any facts which he thinks that he can disprove; but either plea will have the effect of putting the facts in issue. It is, however, wrong to plead that the defendant "knows nothing about" a fact, or that he "puts the plaintiff to strict proof of it." In one English case where the defendant contended himself with "putting the plaintiff to proof of all the facts alleged in his statement of claim" it was held by Fry, J., that all the facts were admitted: *Harris v. Gamble*, L. R. 7 Ch. Div., 877. Perhaps the courts would not be quite so strict now; but the case stands as a warning against carelessness.

If a defendant wishes to deny a fact, he "must not do so evasively but must answer the point of substance": Order VIII, Rule 4. In the United Provinces the plea, "Paragraph.....is denied" or, "is not admitted," seems to be consecrated by usage and to be construed as a denial of every possible combination of the facts alleged; though this method of traversing is not justified by any of the forms in appendix A to the Civil Procedure Code which ought to be followed "as nearly as may be" (see Order VI, Rule 3). Bullen and Leake give a form for this

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comprehensive plea of denial :—" The defendant denies specifically each and every statement of fact in paragraph....." or " Except as admitted above" (if the defendant has made admissions) " the defendant denies, etc." ; though the authors add a caution that this form should not be used when denying " the more important or essential allegations " in the plaint ; and the Court of Appeal in England has in a recent case—*Grocott v. Lovat*, (1916) Weekly Notes 317—allowed a somewhat similar plea, while characterising it as " loose and irregular." Such a plea can, however, be evasive in some cases and ought not then to be allowed as it is too narrow. The following is a still more objectionable form of traverse, though it often appears in written statements filed in the courts of the United Provinces :—" Paragraph.....of the plaint *as stands* is not admitted." The plea should state definitely which facts are admitted and which are denied. Or, if the defendant's pleader wants to admit the facts, but subject to other additional facts which he wants to allege, the proper plea would be :—" The defendant admits the facts stated in paragraph.....of the plaint but says that"(setting out the new facts on which the defendant relies).

Illustrations.

1. When denying the fact of a loan of money the defendant ought either to deny " that the alleged sum or any other sum was lent to him by the plaintiff " or else to plead that Rs..... and no more was lent to him by the plaintiff. Order VIII, Rule 4.

2. If the plaintiff alleges that on the.....day of.....1924 the defendant contracted with the plaintiff (to build a bungalow, etc.) for the plaintiff for Rs.....and to complete the work

within..... months, a mere denial would be evasive. The defendant either ought to deny that he contracted "as alleged in paragraph... of the plaint or at all," or else, after denying that he contracted as alleged, ought to plead his own version of the contract.

3. If the plaintiff alleges that the defendant "spoke and published" certainly defamatory words about the plaintiff on a certain occasion and in the presence of certain people, the correct traverse would be:—"The defendant denies that he ever spoke or published the words alleged in paragraph..... of the plaint and denies that the said words, if spoken or published which the defendant does not admit, referred to the plaintiff." If an allegation is made with divers circumstances, it shall not be sufficient to deny it along with those circumstances Order VIII, Rule 4. ,

4. In a suit against Hindu sons to recover a debt due by their deceased father, if the plaintiff alleges that he lent the father a certain sum for a certain purpose, a mere denial would not do. A complete traverse would be:—"The plaintiff did not lend the sum alleged or any other sum to the said.....if the said sum was lent at all, which the defendants deny, it was not lent for the purposes alleged by the plaintiff"

There are three useful rules :—(1) If the defendant wants to deny absolutely that he did a certain thing, let him deny that he did it "as alleged or at all" (2) If the plaintiff says that the defendant "didand.....," let the defendant "deny that he did either.....or....." (3) Concentrate on the essential point. If A says that he built on B's land with B's permission, the essential point is the permission—"The defendant never gave the plaintiff permission to build (a house) on the defendant's land".

If will probably be said that there is no reason why a pleader should trouble himself to be precise as long as the courts will allow him to say, "Paragraph.....is denied."; but even if an inexperienced pleader thinks that, in the end, he had better play for safety and use such a plea, he will find that, if he takes the

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trouble to think *how* he ought to traverse each allegation *and how much* he ought to traverse *and why*, he will find that he will have a much better knowledge of his client's case, and of what a very astute advocate used to call the "working points" in it, than he would have had if he had contented himself with denying everything in the general way stated above without giving any thought to the subject.

The next point is that a defendant must not "plead the general issue." He may not "deny generally the grounds alleged by the plaintiff; but must deal specifically with each allegation of fact of which he does not admit the truth except damages: Order VIII, Rule 3; and, even in the case of damages, if "special damages" are claimed, he ought to deny the grounds on which they are claimed unless the only question is about the amount due on those grounds. Here is an outrageous plea of the general issue:—"The defendant" (in a suit for pre-emption) "says that *under the law set up by the plaintiff* he has no right of suit." A plea that "the defendant will contend that, on the *facts* alleged by the plaintiff, he is not entitled to the relief which he claims," would be a harmless—and unnecessary—objection in point of law; but the plea stated above ought to be struck out at once as embarrassing. It not only has the effect of "denying generally" the grounds on which the plaintiff has put his case; but it would, if allowed to stand, cover all those "new facts" which under Order VIII, Rule 2, must be pleaded explicitly by the defendant.

The pleading of these new facts under the above-mentioned rule is known in English law as "confes-

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sion and avoidance." The defendant for the purpose of such a plea confesses or admits the facts alleged, by the plaintiff and seeks to avoid or nullify their legal effect by alleging other facts which would constitute a defence even if the plaintiff were to succeed in establishing all his allegations. It is usual in the United Provinces to put forward such facts at the end of the "written statement" under the heading of "additional pleas." As a mere matter of form and for the sake of clearness, it is usually better to plead them in answer to the particular paragraph in the plaint with which they are directly connected, though it must be admitted that, in the matter of form, a pleader who has to draw a "written statement" is to a great extent at the mercy of the plaintiff; if it is confused, he cannot marshal his pleas in as logical an order as he would otherwise do, especially if the plaint repeats itself; and in such a case, or if his plea in confession and avoidance is a defence to ever cause of action alleged, it is better to put it in after he has dealt with all the allegations in the plaint. The principal thing is to remember that no "traverse," however wide, will allow a defendant to do more than contradict the plaintiff's evidence about the facts alleged in the plaint and give evidence of such other facts as would, under the Evidence Act, be relevant to disprove the evidence given on behalf of the plaintiff. If the defendant wants to shift his ground, he must show where he intends to go. Rule 2 of Order VIII gives six instances of new facts which must be pleaded namely, fraud, limitation, release, payment, performance and facts shewing illegality. A few others may be added.

and denials made by the defendant. But such a reply is superfluous. They are put in issue by the written statement. The only cases in which it is necessary for the plaintiff to "plead over" to the defence occur where there is some special matter which he is bound to introduce and plead in answer to a "confession and avoidance" by the defendant. It may be that the plaintiff has to meet this by another "confession and avoidance." This may occur where the plaintiff claims land, and is unaware whether the defendant intends to resist the claim by relying upon some special rule of inheritance, or whether he means to rely upon a will believed to have been made by the common ancestor. Following the well-known precept not to ~~keep~~ before you come to the stile, a prudent pleader would never dream of attacking the will in advance, before the defendant has set it up in defence. Unfortunately, this is often done out of over-anxiety, and ignorance of the true office of a reply. The pleader ought to wait until the will is pleaded, and then apply for leave to deliver a reply alleging that the will is a forgery, or whatever else may be the attack to be made upon it. The task of deciding when to attack in advance, and when to keep your forces in reserve to await the attack from the other side is, for the most part, simple. On occasions the decision to be made is both difficult and important. But under the modern system of pleading in India the whole responsibility is really thrown on the court. The plaintiff can apply to the court for leave. If leave is refused, the court will certainly give leave for the new matter to be pleaded by way of amendment to the plaint, and as the costs in India in such matters

are small, and, the apparent "rebuff" to the judgment of the pleader involved in the refusal by the court is of small importance in a system of law where so little attention is paid to pleadings, the pleader may take a light view of his responsibility in the matter, and go to the court for leave to deliver a reply if he wants to do so. No attempt should be made in a reply to add a fresh claim. Indeed, any such attempt would be doomed to failure, since the court would be bound to refuse leave, and tell the pleader that if he wants to raise new matter he must amend his plaint, because Order VI, Rule 7, expressly prohibits any "departure in pleading"—"No pleading shall except, by way of amendment raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same."

Illustration.

Suit to set aside a mortgage of joint family property on the ground that there was no necessity for it. Defence :—There was necessity for it, namely Reply :—That necessity may have existed but the money could have been borrowed at a much lower rate of interest. This would be a departure. The plaintiffs first say there was no necessity and then admit that there was. The facts alleged in the reply ought to be pleaded alternatively in the plaint :—"If there was any legal necessity for raising the money secured by the said mortgage (which the plaintiffs do not admit), the rate of interest payable under the said mortgage is excessive. The said money could have been borrowed at a much lower rate of interest."

There do not seem to be many cases coming under Hindu or Muhammadan Law in which it would be necessary to deliver a reply. One or two of them may, however, be taken as examples.

*Illustrations**

1. Suit against Hindu sons by a creditor of their deceased father to recover a debt due by him at the date of his death

Unless the plaintiff were very sure of his ground it would be foolish for him to allege in his plaint that the money was borrowed for and expended upon some particular purpose. He would thereby take on himself the burden of proving that the money was borrowed for that very purpose and he would not be allowed to give evidence to show that it was borrowed for any other purpose, however, innocent. It would be wiser for him to wait and see what the defendants' case is. If they plead "immoral purposes" they will have to say what the purpose was, and the plaintiff can, if necessary, deal with that in a reply. *E g.*, if they allege that the debt was incurred in consequence of giving surety for the "appearance or honesty" of another, the plaintiff could reply that the father received consideration for doing so.

2. Suit to set aside a mortgage of her husband's separate property by a widow when in possession as such. The plaint sets out the mortgage and alleges that there was no necessity for it. Defence:—The reversioners nearest in inheritance at the time of the mortgage consented to it. Reply:—A, B and C were nearer (or as near) in inheritance at that time and did not consent: or,—the consent of the reversioners mentioned in paragraph.....of the written statement was obtained by the fraudulent representation of (the widow) thatwhereas the truth was that.....and the defendant was, at the time when he advanced the money secured by the said mortgage, well aware that the said representation had been made to the said reversioners and that it was false."

CHAPTER IX.

Definiteness and Particulars.

Unless a pleader alleges facts with precision, he is certain to commit one, and is likely to commit both, of two mistakes :—he may find that he is pleading law and not facts at all, or his statements may be so vague as to force the other side to ask for particulars ; and will also produce the impression either that he is a very careless lawyer or that his client has a bad case. There are so few decisions on this question where Hindu or Muhammedan Law is concerned that the following hints may be useful, at any rate to a young practitioner.

(A) *Cases coming under Hindu Law.*

Wherever an alienation, whether for value or ^{not} ~~but~~, by a person having only a limited power of dealing with property is questioned, if the defence of "legal necessity" or of a belief, after proper inquiry, that such necessity existed, or of "pious purposes" is set up, the nature of the necessity or purpose, as the case may be, ought to be definitely stated. If it is alleged that a mortgage or sale by a father was made in order to pay an "antecedent debt," the amount and nature of the debt, the name of the creditor, and the date when it was incurred should be given. If Hindu sons, or grandsons, allege that their father, or grandfather, incurred a debt for an "immoral purpose", they should state definitely what the purpose

was and when and to whom the money was paid and in what way it was applied to that purpose.

Wherever the character of property is material, *e. g.*, that it is "separate property", or "gains of science", or Stridhan, it is not enough to allege simply that the property has that character; for *that* is a conclusion of law. All the material facts which impress that character upon the property should be pleaded. Thus in the case of Stridhan it may be necessary to state (a) the school of law to which the owner was subject, (b) the sources from which the property came to her, and (c) the capacity in which she acquired it, whether as maid, as wife, or as widow. If the parties are merely disputing about the division of property which their ancestor acquired upon a partition, the plaintiff need not do more than plead that "the property (described in the schedule) was acquired by the said.....(the ancestor) under a partition effected on or about...." (*or*, "in the year...") but if the plaintiff is suing for a declaration that a partition was made, or is asking to have it re-opened, he ought to plead the agreement by which it was effected, its date and the names of the parties to it. If he relies on an implied agreement, he can plead that "in or about the year.....the said " (naming the persons then entitled to make a partition) "entered into possession of separate shares of the property set out in the schedule hereto, namely, the said A took the property numbered 1 to 3 in the said schedule, the said B took, etc., and the said shares were thenceforth treated as separate and distinct properties and not as the single property of one joint family." This would do, if the property had been divided by

metes and bounds ; but if the plaintiff's case was that, though the property had not been physically divided, the income or profits had been divided into fixed shares and distributed in that way, and that the subsequent acts and conduct of the parties showed that there was a tacit agreement to treat those shares as separate property, the plaintiff would plead that, since the time at which, according to his case, a partition was made, the income of the property was paid to, and its expenses or outgoings, such as rent, revenue, etc., were always paid by, the persons then entitled to effect a partition in fixed proportions (which should be stated). If any property had been bought since the date of the partition and paid for in fixed proportions every circumstance of the purchase should be set out ; and all similar allegations upon which reliance is intended to be placed must be pleaded with particularity. If one of the parties to the *alleged partition* had died before the date of the suit, the plaintiff would have to give the date of the death, and allege that after the death of that party his share of the income and expenditure was paid to or by those who would, under the rules of Hindu Law, be entitled to inherit his separate property. Particulars of such payments with the names of the recipients would have to be given and might be as follows :—

Particulars of the acts and conduct relied on as evidence of a partition :—

1. One-fourth of the revenue of the said property was paid in the name of X, the rest was paid in the joint names of the three brothers of the said X, namely A, B and C. The plaintiff will rely upon receipts

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from the Revenue authorities from January, 1910 to July, 1919.

2. Of a sum of Rs. 35,000 recovered on the...day of.....in a suit No. in which the said X and the said A, B and C have plaintiffs, one-fourth was paid to the said X and the rest to the said A, B and C jointly, on or about the.....day of.....19.....

3. The property numbered.....in the said schedule was let in.....to Ram Prasad at a monthly rent of Rupees.....One-fourth of the said rent was paid by the said Ram Prasad to the said X and the balance to the said A, B and C, jointly.

4. In the year.....the said X, A, B and C purchased the property numbered.....in the said schedule in equal shares for Rs.....One-fourth of the said sum was paid by the said X, and the balance by the said A, B and C.

5. In a suit No.....brought after the death of the said X, by the said A, B and C, the said C sued to recover one-fourth of the property then in suit as the adopted son and heir of the said X*.

When pleading an adoption by a widow, the fact that she was subject to a school of law under which authority to adopt is not necessary, or the authority upon which she acted, should be alleged. If the authority was in writing, particulars of the document ought to be given, and if the authority to adopt was verbal, the date when, the place where, and the short effect of the authority so alleged to have been given ought to

* See the facts in *Chowdhry Ganesh Datt v. Musammat Jewach*, 31 Ind. App., 10.

be stated. A general allegation that all the ceremonies necessary for an adoption were performed seems to be sufficient ; but if the opposite party wishes to question the validity of the adoption on the ground that any necessary part of the ceremony was omitted, he ought to state which part was omitted. That is an illustration of the rule that a party is entitled to know the nature of the case which is going to be set up against him. It would be permissible to plead that "the alleged ceremony never took place at all" ; but a denial, "all the necessary parts of the ceremony were not performed," would be evasive and should be struck out by the court.

(B) *Cases coming under Muhammadan Law.*

Muhammadan Law does not (in this particular matter) present as many difficulties as Hindu Law. Its rules of inheritance seem, it is true, extraordinarily complicated to an outsider ; but, in such cases, a pleader for the plaintiff need only set out the state of the family at the time when the deceased owner died and state the proportionate amount of the property which his client claims ; the defendant's pleader can then either deny any fact of relationship to the deceased which would affect the plaintiff's rights, or allege new facts, or admit the facts and object that the plaintiff's share has been calculated upon a wrong view of the law. There are, however, a few cases in which an inexperienced pleader might make a mistake. In the case of a gift, it would not be enough to allege that "the said...made a gift of the said property to the plaintiff (or defendant)." That would be a conclusion of law (See *In re Parton* : 45

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L. T., 755, where a plea that "the said... made a good and valid *donatio mortis causa* to the defendant" was struck out because the manner in which the *donatio mortis causa* was made should have been stated) ; the facts to be pleaded would be (1) the way in which the giver's intention to make the gift was manifested—whether verbally and, if so, the words used, or by a document and, if so, what the document was, (2) the way in which the donee accepted the gift, whether expressly or by conduct, and (3) the manner in which, and the time when, possession was delivered. If the subject-matter of the gift was incorporeal property, the acts relied on as equivalent to delivery should be pleaded ; or if it was a case of *hiba-bil-iwaz*, the nature or amount of the consideration, the time when, and the manner in which it was given, should be pleaded.

In cases of divorce, the time when and the exact manner in which the alleged divorce was effected (*i.e.* the words used) ought to be set out in the pleading.

In pre-emption suits, if the defendant alleges that the plaintiff has omitted to claim all the land which, if he had a right to pre-empt as alleged in the plaint, he could claim, the written statement should indicate clearly the land which the defendant says has been omitted from the claim.

Apart from cases of the kind mentioned above, which are peculiar to India, there are a number of others in which the principle is—or ought to be—the same in India as in England, since Order VI, Rule 4, merely reproduces the English Order XIX, Rule 6. A pleader can look these up for himself in any

English book on practice ; only the more usual classes of cases are dealt with here :—

1. If a plaintiff claims, or a defendant sets off, a sum composed of various items, he must set out the items in his pleading, or deliver particulars of them along with his pleading.

2. The date when, the parties to and the manner in which (whether verbally or in writing), a contract was made should be stated. If a contract is alleged to be implied, the conduct from which it is to be inferred should be indicated.

3. The manner in which an actionable claim was transferred should be stated, so as to show that the provisions of the Transfer of Property Act were observed.

4. If a party gives credit for a " lump sum ", he must state the items composing it.

5. The grounds upon which " special damage " is claimed, and the basis on which it is calculated must be pleaded.

6. In suits for defamation, the exact words must be stated in the plaint. If the defendant takes upon himself the grave risk of a " justification ", which, if it fails, ought greatly to increase the damages, he must, (unless the words clearly refer only to one specific fact and all the circumstances are stated), give particulars, *e. g.* if the words were :—" he (the plaintiff) cheated A ", a plea of justification should state what acts the plaintiff did which in law amounted to cheating. If the words accused the plaintiff of " taking bribes," the defendant, if he justifies, must state the time when, and the person from

whom each bribe on which he relies was taken and the amount of each bribe. Similarly if the defendant pleads "fair comment" or "privileged occasion," he must, as the case may be, give particulars of the facts on which he was commenting, or the facts which, he says, made the occasion privileged. He must also remember that there can be no fair comment on facts which are themselves untrue. If the facts are falsely stated, then the plea of fair comment must fail.

7. In suits for false imprisonment, if the defendant justifies his conduct, the burden of proving that he had reasonable and probable cause for acting as he did, and that he acted without malice, lies on him; and he will have to give particulars of the offence which he believed to have been committed by the plaintiff, and of his reasonable and probable cause for suspicion, but without giving any names, *Green v. Garbutt*, 28 T. L. R., 575.

In suits for malicious prosecution the burden of proving that the defendant had no reasonable or probable cause and that he acted maliciously, lies on the plaintiff. But if the defendant, instead of merely refusing to admit that he acted without reasonable and probable cause, pleads affirmatively that he had such cause, he must give particulars. *Maas v. Gas Light and Coke Co.* [1911] 2 K. B., 543, where an interrogatory in very wide terms was disallowed by the court of appeal on the ground (*semble*) that it would have forced the defendant to give the names of his witnesses. The distinction between these two classes of suits is dealt with in a note to the precedents of plaints for these torts.

8. In a suit for wrongful dismissal, the defendant may be in a position to plead that he was entitled to dismiss the plaintiff, without assigning any reason for doing so ; but, if he alleges that he had good grounds for acting as he did, he must state specifically the acts of the plaintiff on which he relies ; a general charge " that the plaintiff had been guilty of serious misconduct," would not be sufficient.

9. Fraud, or innocent misrepresentation, must be pleaded with extreme precision. A judge ought not to take any notice of a vague allegation that a party (or any other person) had been misled, whether innocently or fraudulently. The date when, the place where, the person to whom the statement was made, and the exact statement made, and the respects in which it was false and intended to deceive, and that it did deceive, must all be stated. This has been said so often and by so many judges both in India and elsewhere that a reference to the latest ruling on the subject, *Gauri Shankar v. Musammat Manki Kunwar*, (I. L. R. 45, Allahabad 624), ought to suffice. The form of an order for particulars of fraud, the duty of a judge to make such an order of his own motion if fraud is not pleaded with sufficient preciseness, and the effect of such an order are all dealt with in the judgment of the Chief Justice in that case. It is there laid down that if proper particulars are not given the averment should be struck out, and that, if particulars are given, the party giving them should not be allowed to give evidence of any fraudulent act or statement which is not included in the particulars. If a claim is based exclusively upon an allegation of fraud, and particulars are not pleaded, the plaint

should be rejected unless the plaintiff furnishes particulars : *Gunga Narain v. Tiluckram Chowdhry*. (L. R. 15 Ind. App., 119).

A party may, it is true, say that the thing speaks for itself ;—that a particular transaction is so absurd or improvident that, when the circumstances in which it was carried out are taken into account, it ought not to be allowed to stand. In such a case there probably will have been fraud somewhere ; but the case is independent of fraud. If a party alleges such a case, he ought to state the circumstances on which he relies, *e.g.*, the state of health of mind, or body, or the ignorance, etc., of the person who parted with the property or carried out the transaction which is impeached, the fact that he had no competent independent advice, and the state of his affairs or family relations which would show that the transaction was either improvident or unnatural, etc., in the circumstances ; see *Mahomed Baksh Khan v. Hosseini Bibi*, L.R., 15 Ind. App. at p. 92 ; but a party who put forward a case of this kind could not, unless he had also pleaded some definite fraud and given full particulars of it, give any evidence of a specific act of fraud on the part of any one. The rules given in this paragraph apply also to cases of undue influence, coercion, or any other kind of improper influence, and to cases of “mistake.”

10. “Mistake” is usually produced by fraud, but the two differ both in kind and in effect ; though the heading of the plaint in form 34 of the Schedule to the Civil Procedure Code muddles them up. The plaint shows a case of misrepresentation,

as the plaintiff knew quite well what kind of "agreement" he was signing and what he was buying, namely a particular plot of land. In a genuine instance of mistake a plaintiff may make one of two cases, (a) "I was misled about the nature of this document, or about its effect," *e.g.*, "I was told it was a receipt whereas it is a promissory note" or, "I was told it only transferred village.....to A, whereas it transfers all my land to B." In such cases the exact nature of the representation about the document and when, by whom and to whom the representation was made, must be stated ; or (b) the plaintiff may say:— "I don't remember having signed the document at all and I never would have signed it if I had known what it was. I am incapable of transacting business without assistance" (here the plaintiff would have to allege reasons for his disability) "and, if I signed this document at all, I must have done so because I believed that it was necessary for the ordinary management of my property or affairs." Such an averment would not leave an opening for the plaintiff to give evidence of any specific representation about the nature or effect of the document in question, and could be adopted only by a party to the document. Anyone claiming under him would have to set up a case of the first kind, or as in a case of fraud say that the nature of the transaction spoke for itself.

11 Undue influence is a subtle form of coercion, or a kind of fraud ; indeed English Law classifies the more usual instances of it as "constructive fraud." They fall naturally into two separate groups.

(A) Cases coming under S. 11P of the Indian Evidence Act. Here it will only be necessary for a pleader

(if he is relying entirely on the provisions of the section) to plead a "position of active confidence" (stating how it arose and what it was) between the transferor and the transferee, and allege that the transferee had no competent and independent advice ; but a plea of this kind, standing alone, will not open the door to evidence of specific acts of domination over, or pressure put upon, the transferor by the transferee. It has been held in many cases in India that in the case of transactions with *pardanashin*, women the burden of proving that the transaction was fair lies on the party setting it up. In addition to the relationships given in the Evidence Act as illustration to S. 111, the following relationships have been held in English Law to create a position of active confidence :—

(1) Guardian and ward, and any case in which, for all practical purposes, the relationship of parent and child exists. The facts constituting the alleged relationship must be pleaded.

(2) Principal and agent in transactions connected with the agency. Indian Contract Act, Secs. 215 and 216.

(B) Cases in which, apart from any fiduciary relationship, one person has for any reason been able to dominate, and has in fact dominated, the will of another. Here a pleader ought to be cautious. Anyone is entitled to offer advice (though it is not always wise to do so unasked) ; and anyone may ask for a favour ; so that the mere fact that advice—even though not disinterested—has been offered, or that a request for a favour has been made, does not prove

undue influence. Proof that a man would not have done what he did if no advice had been given, or no request made to him, will not suffice. It is necessary to allege in the pleading, and to prove at the trial, that the influence was such that the man upon whom it was exercised was for some reason incapable of resisting it—that, though he had a judgment of his own, he could not exercise it, but was obliged to bow to the will of another.* Such a case is quite different from that of a man who for some reason, such as illness or extreme mental distress, is so feeble in mind or in body that he is for the time being incapable of exercising any independent will at all. In that case no influence, however benevolent, wise, or disinterested, ought to be exercised by anybody to make him dispose of his property, or enter into a contract; and it would only be necessary to plead that because of..... (stating the reason) the person in question was incapable of exercising any choice, or forming any judgment *at all*. An averment of that kind would only put in issue the condition of the person who, *e.g.*, signed the document or made the gift; the nature of the influence to which he was subjected would be immaterial; but if the pleader means, "he did not want to do it," and not, "he could not have done it," the pleading must state definitely the "how" and the "why" and the "when", so that the opposite party may know the kind of case he has to meet. Order VI, Rule 4, is explicit about particulars of undue influence and the English rule is the same, though the English and Irish practice in Probate (see *Salisbury*

* See *Wingrove v. Wingrove*, 11 P. D. 81 approved by the Privy Council in *Baudains v. Richardson* (1916) A. C., 169.

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v. *Nugent*, 9 P. D., 23, and *Wallace v. M Dowell*, (1920), 2 Ir. R., 194) is different, being based on a special rule relating to probate actions which does not mention undue influence. If the pleader is relying on some definite act, some threat, or bullying, or if he means that constant importunity was practised on a man so weak that he would have done anything for the sake of peace, then the pleader must state who threatened or urged, how he did it and when he did it. If the pleader means that, apart from any one act, a man's mind was so dominated by another's that he would tamely do anything he was told, then the pleader must state, if possible, the cause of that domination,—fear, a belief in supernatural powers, or whatever it may be—and give particulars of the instances relied on to prove that domination did in fact exist, and to show its extent.

12. Whenever it is alleged that any person was, by reason of unsoundness of mind, unfit to make a will, or otherwise to deal with his property, or to contract, the nature of the insanity or mental deficiency should be stated in the pleadings, *e.g.*, if it is alleged that he was subject to delusions, the nature of the delusions should be stated.

13. In order to bring about an estoppel, the words used must have been "unambiguous and precise" (*Per* Bowen, L. J., in *Low v. Bouverie*, [1891] 3, Ch. 82). The exact words used ought, therefore, to be pleaded, or the conduct by which the party relying on the estoppel was misled, and the manner in which, on account of the representations, the party misled acted to his detriment

14. In suits against trustees for breach of trust, a plaintiff must give particulars of every breach of trust which he wishes to prove. A specific allegation of one act or omission of that kind does not give the Court a roving commission to enquire if others have been committed—if a plaintiff is not satisfied with the conduct of the trustees, and has not sufficient materials to enable him to point to definite breaches, his proper course is to sue for an account of the trust funds and of their management, and to apply for discovery. After seeing the documents, or the answers to interrogations, he can give better particulars. In England the pleader invariably adds, “the plaintiff will give further particulars after discovery.”

15. In suits for damages for negligence, acts of negligence or of contributory negligence on which a party relies should be stated with reasonable precision.

16. Whenever any relation is to be implied from documents, conversations, or circumstances, these should be indicated with sufficient accuracy to enable the other party to know what they are, *e. g.*, the dates of the correspondence or conversations, their subject-matter, and the persons, between whom they passed or took place; or, if a tenancy is to be implied from payment of rent, the dates between which, the persons, by whom, and to whom, rent was paid, and the amount of the rent paid should be stated.

17. Under Order VI, Rule 10, “conditions of mind” may be alleged without stating the facts from which they are to be inferred; but this does not absolve a pleader from the obligation to be precise

about the acts which were done with a particular condition of mind, *e. g.*, after alleging that a particular statement was made by A to B on a certain date, it is enough to say it was made knowing it to be false (*or*, not believing it to be true) and knowing that B would act on it, but this is very different from alleging that A fraudulently induced B to do a certain act without stating in what manner, and when, A induced B to do it.

CHAPTER X.

The duty of the Parties.

The object of this chapter is to explain the principles upon which the preliminary, or interlocutory, proceedings before trial, ought to be conducted with a view to remove from the pleadings all objectionable and embarrassing matter, to prevent surprise, and to clear away the ambiguities and doubts with which faulty pleading may have clouded the issues. It must be admitted that in most parts of India, particularly in the mofussil, the means of effecting this object are extremely limited. Very few courts in the mofussil possess the machinery, or anything approaching to it, such as the Masters' Chambers in the High Court in London, and in some of the Presidency towns in India, for doing this work. It must be done by the judge in court, if it is done at all, unless he makes special arrangements; and he has no time for it, and probably little experience of it. The latter is all-important, for unless the work is done efficiently, it is worse than nothing. It only multiplies delays, expense, and confusion. The object of the work of the Civil Justice Committee was, amongst other things, to find a remedy for delay and prolixity, and it remains to be seen how far the conditions, and the money available, will enable substantial improvements in this direction to be made. It is often objected that in matters of substantive law, the courts in India are too prone to cite

authorities from the English Reports. The Privy Council have several times protested against this practice, but have done so, generally speaking, only where authorities decided under an English Statute have been cited in support of the view taken by a court in India of a differently worded Statute. But the provisions in the First Schedule to the Civil Procedure Code, and in particular those which relate to this branch of our subject, are, in the main, taken bodily out of the rules of the Supreme Court in England. It must be acknowledged that this has been done without the provision of the correlative machinery which alone can enable those rules to be properly worked. None the less, the principles and practice established by many years of working and of judicial interpretation in England, are clearly relevant in the courts in India where the same rules are in force.

The prime consideration in England, contemplated by these rules, is that the procedure is to be put in motion by the parties themselves, and not by the Court. The Court has to adjudicate; it cannot originate. It is only interested judicially when appealed to, except in the sense that every true lawyer must be interested in seeing that the work of his court is well done. In the majority of cases, a judge can know nothing of a defective pleading before the trial, or at any rate before the framing of the issues, unless his attention is specially drawn to it. It may therefore be said that the failure of the courts, generally speaking, to apply these rules of practice for the correction of pleadings, is due to the lack of skill amongst practitioners, and to their inability to re-

cognize in others the faults of which they themselves are unconsciously guilty. It may be too, that, inasmuch as a great deal of litigation in India is intended to obscure, rather than to elucidate, they prefer to follow their own methods, and not to draw attention to faults committed by others of which they themselves are painfully conscious in their own work, and which they prefer to ignore, rather than to encourage similar attacks upon their own work on other occasions when it suits them to be vague, prolix, and obscure. It is, in any case, an axiom that unless a practitioner has himself mastered the art of pleading he certainly will not be able to decide when and how to attack with advantage the pleadings of others no better than himself. So that the fundamental errors become mutual and perennial. The provisions contained in the rules are not intended so much for the purpose of affording disciplinary control over pleaders, as for assisting the ends of justice by removing reasonable objections raised by the opposing parties. But if the parties do not object to embarrassment, and will not utilise the means provided by the law for getting rid of it, the embarrassment will remain, and will become a source of further embarrassment to the court when it is too late to correct it and, as often as not, a source of embarrassment also to the successful party.

Logically and chronologically, the duty of raising objections to a pleading falls first upon the defendant. The defendant is entitled to particulars of everything which is vaguely or insufficiently alleged in the plaint. The defendant's pleader should, therefore, first of all and before attempting to draw the written state-

ment, carefully peruse the plaint to see whether there is anything as to which he is entitled to ask for further particulars. Order 6, Rule 4 provides that "in all cases in which the party relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms [in Appendix A] particulars (with dates and items if necessary) shall be stated in the pleading."

This rule confers an absolute right upon the other party to apply for further particulars, if those given are not adequate, *before any other step is taken*. The court, using its discretion as to whether the particulars contained in the original pleading are sufficient, is bound to order further particulars if it decides the question in the negative. The proper form of order is:—"Particulars of paragraph 4 of the plaint to be delivered by the plaintiff within fourteen days, otherwise the said paragraph to be struck out. Written statement to be delivered within fourteen days of the particulars." The rule under which pleadings may be ordered to be struck out is Rule 16 of Order VI, which runs as follows:—

"The court may at any stage of the proceeding order to be struck out, or amended, any matter in any pleading which may be unnecessary or scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the suit."

The salient words of this rule are "or amended." Many practitioners seem to think that unless it can be shown that a pleading ought to be struck out, it is

idle to attack it. But this is not so. No one wants to prevent a litigant from prosecuting a just claim merely because his pleader has not alleged it with the distinctness required by law. Of course, if a plaint is wholly scandalous it ought to be struck out forthwith. But the plaints in which this occurs are few compared to those which are defective and ought to be amended. "Striking out" is merely the last resort when the litigant is disobedient and obdurate. This ultimate penalty is held over him *in terrorēm*. A common form of order in Chambers in England under the rule corresponding to Order 6, Rule 5 (see below) is that if proper particulars be not delivered within a certain time the action shall stand dismissed, or be stayed. This form of order has been sanctioned by the Court of Appeal. Amendment by ordering particulars is clearly the first and the proper remedy. This is easy to follow, if one thinks about it. The rules require particulars as to dates, items, place where, and so forth, to be given in the original pleading. This injunction, let us suppose, is disobeyed by the pleader. The other side, thereupon, applies to the court for an order that such particulars shall be given. What is the penalty? This is left to the discretion of the court. But it is obvious, and requires no rule or judicial decision to enforce it, that if the court orders the particulars to be given so as to make the pleading conform to law, and be fair to the defendant, it must be of opinion that the failure to give the particulars will tend to prejudice the fair trial of the suit, so far as the defendant is concerned, and to delay it, because the defendant is clearly not bound to plead at all until he gets the particulars to which he is entitled.

Therefore, if they are not given, 'that' part of the claim ought to go. The remedy is in the hands of the plaintiff himself. If he does not choose to give the particulars which he is ordered to give, he must give up his claim. He is disobeying the order of the Court, and is in contempt. And yet such an order is seldom applied for in India. But the right to apply for it is inalienable and the jurisdiction to grant it is clearly provided by Order 6, Rule 5 :—

“ A further and better statement of” the nature of the claim or defence, or further and better particulars of any matter, stated in any pleading may in all cases be ordered, upon such terms, as to costs and otherwise, as may be just.”

How can the court perform its duty under this provision unless the parties make application for the purpose ? The parties themselves ought to know whether a claim, or grievance, is sufficiently alleged to enable it to be met at trial, or, at any rate, to enable the answer to it to be prepared. The remedy, therefore, for much of the unsatisfactory, and sometimes discreditable, pleading which prevails at present, in which fraud and other charges are flung broadcast in the vaguest way, and in which allegations are made with insufficient particularity to tie the party making them down to anything definite, lies primarily with the parties themselves, and the evil never can be arrested, let courts of appeal rage never so furiously, unless the pleaders realise their duty in the matter, and act upon it by applying to the court.

It may be said that there are very few decided cases in the law reports in India which lay down

guidance for the courts in dealing with applications for particulars. But there is no need for precedents. It is a matter for the application of common sense, a right appreciation of the object of pleadings and experience. To attempt the task of giving illustrations would necessitate giving examples of every conceivable variety of inadequate pleading. Each case for requiring further and better particulars must depend upon its own circumstances. The need for circumspection so as to avoid making unnecessary orders is smaller in India than it is in England, where the practice has grown up, because the need for drastic application of the rules is greater. Further, the well established principle in England, that particulars which involve disclosing the names of a party's witnesses need not be given, can hardly exist in India where the court summons the witnesses on the application of the parties, who provide lists of their names and addresses, and the names of witnesses summoned on either side are well-known.

It is, of course, bad tactics to attack a pleading before trial, merely because it is defective. If it discloses no cause of action, it is better to leave it alone till the trial, and then, unless it is amended so as to establish some legal claim for relief, to ask that the suit be dismissed. To attack it prematurely on a point of substance, or on a point of law, is equivalent to letting your opponent know where he is going wrong, and gives him an opportunity of putting himself right by making the necessary amendments. Nor ought a pleading necessarily to be struck out, merely because it technically offends against a rule. The real object of attacking a defective pleading is to make it

intelligible. The defendant has a right, *ex debito justitiæ*, to have the plaintiff's case presented in an intelligible form, so that he may not be embarrassed in meeting it. (*Davy v. Garrett*, 7 Ch. D., p. 486, per James, L. T.). An allegation should not be struck out merely because it is "unnecessary." It may be harmless, and to strike it out would be idle. Nor is a pleading "scandalous" merely because it alleges scandalous conduct. "Nothing can be scandalous which is relevant." If the matter would be relevant at the trial as evidence in support of the particular allegation, it will not be "scandalous" in a pleading. This is the most useful test to apply. There is nothing "embarrassing" in the lawful combination of alternative claims, nor in the assertion of inconsistent, but independent defences. Pleders must not be too ready to be embarrassed. But if an allegation is ambiguous, whether in a plaint, or in a defence, or if a defendant does not make it clear how much of the plaint he admits, and how much he denies, then the pleading is "embarrassing."

In all cases of ambiguity, particulars should be applied for. The pleader may be able to make a shrewd guess as to what is intended, but the other side is not bound by the view which you yourself may have taken, and it is better to tie your opponent down irrevocably to his allegation, even though you may be fairly certain what it means. In every case of alleged misrepresentation, or fraud, the defendant ought to apply for particulars as to whether the misstatements are alleged to have been made in writing, or verbally, and for such particulars of either as enable them to be clearly identified. Otherwise, it is impos-

'sible to know the nature of the case which it is sought to make against him.

This procedure, namely of applying to the court for a further and better statement of the plaintiff's case, or for further and better particulars, and for the pleading to be struck out and the claim dismissed if they are not given, is a right given to the parties. Like all rights, it is to be exercised with discretion, and not on a mere technical defect, or under circumstances which, though the pleading is defective in certain particulars, make its correction by order of the court and an application for that purpose, alike superfluous. But while, on the one hand, it is a right given to the party for his own benefit to give him a fairer chance of meeting the claim, it is, on the other hand, the duty of the party, within limits, to exercise the right for the purpose of aiding the court in ascertaining the nature of the controversy,* and the real issues. No chamber practice exists in the great majority of the courts in India for raising and deciding these interlocutory questions before trial. It has been truly said of English practice that many cases are won and lost in chambers. By tying the party down to a strict statement of his case, and by excluding everything of which he is unable to give particulars, the weakness of his case is exposed. Admissions of fact from which he cannot escape, and disclosure of documents to which he has no answer, are extracted from him in such a way that the nakedness of his allegations is laid bare.

The opportunity offered in the ^o mofussil, for exercising this right, and for attacking the opponent's

pleadings, is the day when the parties come before the judge for the settlement of issues. It is to be feared that little is done in the way of clearing the ground, and smartening up the pleadings. Issues are struck in purely formal matters, which everyone knows have no substance in them, merely because they have been pleaded. They appear in the written statement of the defence, when they ought to be struck out, and if they appear, an issue must be framed thereon, otherwise an objection will be raised on appeal on the ground that "the trial court has failed to frame an issue on a point raised by the appellant in his pleading." There seems to be no cure for this until there exists, in the courts, a body of practitioners who have mastered the art of pleading, who know good pleading from bad, and who desire to cast off superfluous matter and to confine the cause to the real controversy. It is not unlikely that the lack of initiative on the part of counsel in the refusal in exercising this right and performing this duty, is due to the subtle but natural growth of a habit of leaving the initiative to the court itself. In England the parties undertake service; in India, it is the duty of the court. In England the parties summon their own witnesses; in India, it is done by the court. In England the parties take out their own writs of execution, and entrust them to qualified persons who act as their agents, and under their direction; in India, execution is carried out by the court. In England although the court officer makes out the "judgment," as the decree is called, the draft is, as often as not, supplied to him by the representatives of the parties who agree upon the form to which the

successful one is entitled as the result of the decision, and if they cannot agree upon any point, the registrar decides or consults the judge ; in India, the decree is drawn up by the court officer, and although it is initialled or signed by the vakil, he does not, as a rule, even read it. Thus, in substantially all the important matters of practice the initiative, the control, and sometimes the whole performance, are in the hands of the court. It is, therefore, not a matter of surprise that the average practitioner who has never learned in a school of pleading, or come to appreciate its fundamental importance, says to himself that if the court sees no reason to interfere there is no reason why he should do so, particularly in a matter in which he will only involve himself in extra time and labour without any extra remuneration. It would seem that before the general performance of the duty discussed in this chapter can be expected, some improvement in the machinery of the courts in India, and some strengthening of the rules in Order 6, are alike necessary.

CHAPTER XI.

Matrimonial Causes.

A short chapter on pleadings in matrimonial cases, with a few precedents in the appendix, is needed by the general practitioner, if one may judge from the pleadings which appear to be commonly in use in the United Provinces in the district courts. It is not intended to give here even the barest outline of practice and procedure in divorce cases. The practitioner who is called upon to represent a client in proceedings of this kind should never do so without carefully consulting Rattigan on "The Law of Divorce in India," and also Dixon on "Divorce Law and Practice in England," inasmuch as the Indian Act requires the principles and practice of the English Court to be followed unless otherwise provided.

The first thing to be borne in mind is the nomenclature. You do not speak of a "plaintiff," but of a "petitioner." The claim for relief is set out in a "petition," and not in a "plaint." The other party is the "respondent," and not the "defendant." If the husband is petitioner, the man with whom the wife is alleged to have committed adultery is the "co-respondent." There may be more than one co-respondent, but there must be at least one, and he must be made a party. Allegations must not be made against men who are not made parties. Unless he has first obtained special leave from the court, a husband is not allowed to present

a petition, or to proceed with one, which does not name a co-respondent and make him a party. As a general rule he is not allowed to proceed without a co-respondent, or to do what is the same thing, to proceed against the wife, and a co-respondent unknown, without showing by affidavit evidence, or such other materials as the Court may require, the circumstances, under which, and the reason why, he has been unable to identify, or if he has identified, has been unable to trace, the co-respondent. He must show that he has made every possible effort, and failed. The pleader must grasp the fundamental principle that English courts, and courts in India administering the Divorce Act, do not grant a decree merely because the petitioner wants his, or her, marriage dissolved. Marriages cannot be dissolved by consent, and it is the duty of the court to discover and defeat collusion between a married couple who may have been guilty of mutual infidelity. All this may be easily discovered by consulting one of the text-books mentioned above. The practice is exceptionally simple for any one who will take the pains to master it, though it is true that complications may arise both of fact, and of conflict of laws, which will present knotty problems for solution.

Before he attempts to draw a petition, the pleader should study, in section 10 of the Indian Divorce Act, the legal consequences of the marital offences which his client alleges against the other party to the marriage. A husband may obtain dissolution of his marriage, or in other words, divorce, on the sole ground that the wife has been guilty of adultery. The reason generally assigned for the difference between

the rights of a husband, and of a wife, in this respect, a difference which has been removed in England but not in India, is that an unfaithful wife may burden her husband with legal liability for children of whom he is not the natural father. A wife must, generally speaking, prove either that her husband has abandoned Christianity for some other religion and married another woman, or that he has committed incestuous adultery, or bigamy coupled with adultery, or rape, or sodomy, or bestiality, or adultery coupled with cruelty, or adultery coupled with desertion without reasonable excuse for two years before the petition. The latter two are those which most commonly occur, and which give least difficulty. But one of the text-books should be consulted concerning the evidence, and nature of proof, required, and the general principles which govern these cases. It should be borne in mind that it is an almost invariable rule that a guilty party cannot obtain relief, so that it is idle for a husband, or wife, to file a petition if there has been misconduct on his or her own part. If both parties have been guilty of misconduct, neither can obtain relief, being bound, as has been said, "by the indissoluble bonds of mutual infidelity." Further, the innocent party cannot obtain relief of the conduct if the guilty party has been condoned by the subsequent resumption of marital relations, or "co-habitation" as it is called. Suits for nullity, which are rare and for the principles relating to which the text-books must be consulted, are generally founded upon non-consummation as the result of impotence. In the case of a wife petitioning for a divorce from her husband on

the ground of some marital offence with another woman, it is neither the rule nor the practice, and is therefore wrong, to join the other woman as a party. She may voluntarily come in and defend herself, and if she does so she is usually called "the intervener. But the principle of the Christian law, probably a survival of the days when a married woman had no separate property of her own, and was thought to be sufficiently punished and disgraced without incurring the burden of being made a guilty party, is not to force legal proceedings on her.

It is as well that the pleader should from the first realise that in the eyes of Christian courts, marital misconduct is an offence, and that in respect of both pleading, and proof, the same preciseness and particularity of pleading is required as in the case of a criminal charge, or as in a civil suit in which the burden is upon a party of establishing fraud, misrepresentation, undue influence, and the like. The same principle applies to counter-allegations of misconduct in the answer of the respondent. The student or practitioner who has already fully mastered the principles and rules enjoined in the foregoing chapters about definiteness, particularity, and conciseness has only to bear them in mind in drawing either a petition, or an answer in divorce, and the rest will be simple. He must start in every case with the following fundamental allegations :—

- I. That the petitioner and respondent were at the time of their marriage Christians and that the petitioner still is Christian.
- II. That the petitioner's domicile is in—

- III. That the petitioner and respondent last resided within the jurisdiction of the Court.
- IV. A statement whether there has or has not been issue of the marriage, and the number, if any, of issue living at the date of the petition.

As to No. I, there is nothing to be said, except that it is the obligatory.

As to No. II, the matrimonial jurisdiction of Indian courts over domiciled Englishmen, resident in India, which was negatived by the English Divorce Courts in 1921, by the decision in *Keyes v. Keyes* (a decision accepted as correct by English lawyers and by some only of the High Courts in India), will stand upon an entirely new footing under the New Indian and Colonial Act (English) which became law in 1926. The Act has conferred jurisdiction, hedged round by a variety of restrictions, and set at rest an acute controversy. It is superfluous to discuss the past. The matter, according to the view established in *Keyes v. Keyes*, is one for the English Parliament. Nor is it necessary to discuss either the law in general, or the provisions of the new Act in detail? Suits between domiciled English must be brought in a High Court, if brought in India at all.

Although domicile is still relevant, because no other than a High Court will have jurisdiction under the new Act over domiciled Englishmen, the issue now concerns rather the correct choice of the court than the form of the petition. But it has been thought right to retain the note on domicile which

appeared in the first edition, as a guide. (*Vide* Appendix II). The petition need do no more than allege the fact of the petitioner's domicile. The answer of the respondent need do no more than object to the court's jurisdiction, where the facts justify such an objection. The grounds upon which a petitioner may proceed are slightly different from those which are applicable under the Indian Divorce Act, and the English law must be consulted in order to ascertain what are the grounds upon which a decree for dissolution may be granted, according to the law in force for the time being in England.

The petitioner must reside in India at the time of presenting the petition, and the parties must be shown to have last resided together in India. It must also be shown, either that the marriage was solemnized in India, or that the adultery, or the crime complained of, was committed in India. The court may refuse to entertain the petition, if it is not satisfied that it is in the interests of justice that the suit should be determined in India. All that it is necessary to say, therefore, is that the pleader drafting a petition must state concisely, but clearly the fact of the petitioner's domicile, and the place of the marriage, and of the last joint residence of the parties, and of the adultery, or other acts complained of. In this respect a divorce petition does not differ from a plaint in an ordinary suit. It must contain all the necessary relevant allegations.

Under the Indian and Colonial Act (English) by which jurisdiction has now been conferred upon the High Courts in India in Matrimonial causes when the parties are not domiciled in India, as there is ~~no~~

modern text-book in India on Divorce which deals with this topic, the pleader should be careful to consult the Act, and the Rules made thereunder, published in the Gazette. He must specifically state, if it be the case, that the parties have a domicile elsewhere than in India, and the grounds upon which it is alleged to be just and convenient that the cause should be tried in India rather than elsewhere.

No. III is sometimes overlooked until the last moment, when it is discovered after a fruitless waste of money and effort, that the Court, has no jurisdiction.

Adultery must, in all cases, be alleged in distinct and unequivocal terms. The place where, the time when, or if the actual date be uncertain, the dates between which the incident can be shown to have occurred, and the person with whom, must all be simply and clearly stated. Each occasion must be separately alleged unless a series is relied upon amounting to continuous living in adultery, such as that "the respondent and co-respondent have been, since 21st May 1924, and still are, living together as man and wife." A statement that the petitioner's wife "committed adultery with J. S. at Allahabad" would be insufficient. It should be stated where in Allahabad, and when, though "on divers occasions at the house of Mr. R., where the said J. S. was residing, during Christmas week" would be sufficient. Pedantry is not required if the statement is sufficient to enable the accused parties to identify the place and time, so as to meet the charge. The pleader should *never allege more than he can prove*. Nor should he indulge in

condemnatory epithets and phrases, which are superfluous, objectionable, and in bad taste, without adding anything to the facts. A man is charged with murder under section 302 of the Indian Penal Code, not with "brutally and wickedly chopping the deceased to death with a *gandasa* in breach of the benign and salutary provisions of the Indian Penal Code for punishing cunning and horrible murderers." So should it be with charges of adultery. The damnatory clauses of the pleader's natural eloquence should be reserved for use in his final address in court, or better still for the judgment, if thought necessary. They are out of place, and look foolish in a pleading, and are forbidden by law. Improper language, vague allegations, immaterial references, and all such errors of pleading, should, at the very latest, be struck out when the issues are framed, if not before, and no pleader for a respondent is either bound to, or should attempt to, settle an answer to a petition which contains vague allegations or objectionable matter, without first applying for "further and better particulars" of the former, and for the latter to be struck out altogether.

Precisely the same rules must be followed in alleging cruelty in the petition. Cruelty, it has been said, is a matter specially within the knowledge of the party complaining of it, and it is, therefore, right, and it should be compulsory, that every species and particular act of cruelty, in respect of which it is intended to give evidence, should be specially pleaded. People do not, as a rule, keep diaries, and very few will be found to have made actual notes of such events so as to be able always to state the precise dates with

unfailing accuracy. But it is nearly always possible to give an approximate date, and add some event, such as a holiday, an illness, a dinner, or a dance, which will identify the occasion. This should be done, if there is any doubt about the date. But where acts of cruelty have been recurrent, frequent and almost continuous, it is sufficient here also to state "on divers occasions in the month of June."

The fundamental guiding rule should be that while, on the one hand, evidence must not be pleaded, all marital offences, however many there may be, of which evidence is proposed to be given, should be stated in the petition. No court ought to allow evidence to be given of an offence which has not been pleaded. Divorce cases, and everything which is said here applies equally to petitions by a wife for judicial separation on the ground of cruelty or desertion, are those above all others in which it is essential, and ought always to be possible, for the pleader to have before him in writing the evidence of the petitioner, and of the witnesses, setting out the acts complained of. He can then extract, and tabulate, the separate acts before deciding what he ought to allege in the petition. For example, a paragraph alleging that a husband-respondent has had two illegitimate children, the issue of an adulterous connection, ought to be struck out. This is not an allegation of adultery, it is only a statement of the evidence from which adultery may be inferred. The adultery itself must be alleged and proved. It would be necessary to do so even if the only proof of it were the parentage of the illegitimate children. In alleging cruelty, moreover, it is necessary to allege the

acts which are said to amount to cruelty, because "cruelty" is a general expression about which opinions may differ, and the acts alleged and proved must be such as amount to what is called "legal cruelty," or, to be more precise, cruelty in the eyes of the law.

When desertion is charged it should be alleged that it was against the will of the party complaining of it, and without reasonable excuse. The pleader should also be careful to allege the date when it began, and if the case should be one in which the occasional meetings of the parties are likely to lead to the contention that the desertion was interrupted, or terminated for a time, so as to give rise to a fresh period of two years, the dates of such incidents should be stated so as to make it clear to the party charged, and to the Court, what the exact period is upon which the party relies. Failure to do this is often due to ignorance of the requirements of the law for establishing desertion, and results in difficulty at the trial, and in gaps in the evidence arising from a lack or appreciation of the difficulty, and of proper preparation to meet it.

These rules must be carefully followed in all cases in which the respondent, by the answer, sets up counter-charges. They must also be followed with the same care in cases in which the respondent relies upon condonation, or forgiveness. Generally speaking, condonation is the resumption of co-habitation with knowledge on the part of the innocent party of the marital offences committed by the guilty party, and with the intention; which will usually be inferred as a matter of course, of forgiveness. It is a plea

in the nature of "confession and avoidance." "Even though I did misconduct myself," says the respondent in effect, "you afterwards forgave me, and on such-and-such a date we resumed co-habitation." The importance of alleging this with particularity as regards time and place is just as great in the case of condonation as it is in the case of the allegation of offences in a petition, because the petitioner is entitled to rely on the fact, if it can be proved, that there has been a renewal of misconduct after the date of the condonation. Indeed, the date of the alleged condonation, when compared with the allegations made in the petition, may show that the plea of condonation is not adequate to get rid of the charges. For the general rule is that former marital offences which have been condoned, are revived, and sufficient in themselves to destroy the defence of condonation, by a subsequent marital offence, even though it be of a different character.

All this sounds simple and elementary. And so it really is. Given the necessary knowledge and experience, and the very ordinary capacity required to distinguish between charges and evidence, and between vague generality and simple definiteness, pleading in matrimonial cases is probably easier, as a general rule, than in any other class of suit. But this very fact, contrasted with the specimens which find their way to court, shows how entirely these elementary principles are ignored, or neglected, by some lawyers in India who undertake matrimonial cases.

The following extracts are taken from a suit which was recently heard in a district court, and in which a

decree for dissolution of the marriage was actually granted, though afterwards set aside :—

AN OBJECTIONABLE PETITION.

PAR. 2.—*Defendant No. 1 (sic.)* as the *plaintiff (sic.)* learnt afterwards, committed adultery with *defendants (sic.) 2 and 3* which act of hers the *plaintiff (sic.)* never forgave.

PAR. 3.—In 1915 (9 years before the suit, and nothing is alleged about whether the parties had co-habited in the interval) *defendant No. 1, (sic.)* under the pretext that money was required for purchasing a house, took Rs. 200 from the *plaintiff (sic.)* and went to J in the district of S and after living there for five or six days she sent a telegram asking the *plaintiff (sic.)* to send more money. Instead of sending the money the *plaintiff (sic.)* himself went there without giving information, and on arriving there suddenly he found the charpoy of the *defendant (sic.)* close to that of S from which it is inferred that they had committed bad act.

[Note.—*The whole of this paragraph is merely evidence, and most of it irrelevant. It contains no statement even of whether the act of adultery to be inferred had been committed that day, or the previous night, or when ; and " S " was not even made a party.*]

PAR. 6.—*Defendant No. 1 (sic.)* had also illicit connection with one G. D. carpenter. On a dispute having arisen G. D. took* poison and committed suicide. On his death an inquiry was made and it was fully proved in it that there was illicit connection between the deceased and *defendant No. 1 (sic.)* and that he committed suicide in connection with it. —

[Note.—*The whole of this paragraph ought to have been struck out, before any answer was filed. There is no precise allegation of any act of adultery, and no suggestion of any date, place, or circumstances. The allegations of the suicide, and of the subsequent inquiry are wholly irrelevant, and embarrassing.*]

THE OBJECTIONABLE ANSWER.

PAR. 2.—Para. 2 of the *plaint (sic.)* is not admitted, and is absolutely denied. It is stated that the fact is utterly false, having been concocted for the purpose of the suit.

[Note.—*The proper plea was :—“ All the allegations in para. 2 of the petition are denied.”*]

(Paras. 4—6 were long statements of evidence, matrimonial disputes, and abusive denials of the charges.)

PAR. 11.—The *p'aintiff (sic.)* is misbehaved and immoral and has illicit intercourse with a private prostitute. He has kept her in his house as his mistress and is under her influence. Consequently, he wishes to divorce the *answering defendant (sic.)* and in order that he may not have to give maintenance allowance, he has brought this utterly false and groundless suit or wrong and fictitious allegations ; but it should, by all means, be dismissed with costs.

[Note.—*It would be difficult to imagine anything more outrageous and objectionable according to the rules of pleading, than the above specimen. The pleader, in another paragraph, indulges in a rambling and abusive statement in answer to the irrelevant alle-*

gations in the 6th paragraph of the petition (cited above) with regard to the suicide, and subsequent inquiry.]

JUDGEMENT OF THE HIGH COURT.

The decree *nisi* granted by the trial court was set aside in the High Court for reasons not material to the present purpose. The judgment of the High Court concluded with these words :—

“ We had considered that the best course to take with this case would be to set aside the decree, and remit the case to the District Judge to rehear it on the pleadings as they stood. But we have examined the pleadings, and it is impossible to allow documents such as the petition and the answer to be the basis of any matrimonial suit. The petition talks of the petitioner as a plaintiff, describes the respondent as a defendant, and similarly describes the co-respondent. It omits to say whether there has been any issue of the marriage. It omits to allege an Indian domicile, if such be the fact, and the allegations of misconduct lack the essential particulars of time and place. Paragraph 3 of the petition is particularly offensive inasmuch as the gentleman who is named is not cited as a co-respondent, and nobody can tell whether the improper and apparently groundless charge is intended to be one of adultery or not. Paragraph 6 also omits the material allegations of time and place, and paragraph 9 alleges the subject-matter of the suit to be Rs. 2,000. Such a statement has no place in petitions for divorce. The answer, which is described improperly as a ‘ Written Statement ’ and is drafted on the lines of one, is incorrect in form, verbose, and

in some places foolish.....Although paragraphs 11 and 12^c contain an allegation of misconduct by the husband, there is no cross-petition asking for relief.Our only course is to set aside the decree, and sweep away the whole proceedings from first to last."

PLEADINGS.

TITLES OF SUITS.

IN THE COURT OF.....

A. B. (add description and residence) ... Plaintiff (a)
against

C. D. (add description and residence) ... Defendant (b)

PLAINTS.

No. 1.—MONEY LENT.

(Title.)

1. On the day of 19 ; the plaintiff lent the
defendant Rs. repayable on the
 day of

2. The defendant has not paid the same, except
Rs. paid on the day of 19 .

[If the plaintiff claims exemption from any law of limitation, say :—]

3. The plaintiff was a minor [or insane] from the
 day of till the day of

4. *Facts showing when the cause of action arose and that the Court has jurisdiction).*

(a) If the plaintiff is suing in a representative capacity, he should say so ; e. g , " A. B., on behalf of himself and all other creditors of C. D.," or, "A. B. on behalf of himself and all other worshippers at the mosque——"[or, all other residents in mohalla—— ; or all other "Debenture-holders in——Company, Ltd.]

(b) If the defendant is sued in a representative capacity, the plaint should so state, and state what it is.

5. The value of the subject-matter of the suit for the purpose of jurisdiction is Rs. and for the purpose of court-fees is Rs.

6. The plaintiff claims Rs. with interest at per cent, from the day of 19

No. 2.—PRECEDENT.

(Title).

(1) At an interview on the 3rd of December 1924 at the shop of the defendants' firm in Napier Street in Calcutta, Ram Saroop, the agent for and on behalf of the defendants' firm, verbally offered to sell to the plaintiff 20 bars of metal, represented and warranted by the said Ram Saroop to be of fine silver of the weight of 1,500 tolas, at the price of Rs. 5 per tola.

(2) The plaintiff agreed to buy the said bars of metal and paid to the defendants the sum of Rs. 7,500 on the said 3rd of December 1924.

(3) Delivery of the said metal was made at Bareilly on the 4th January 1925 and on the 15th January the metal was found by assay to contain 1,300 tolas of fine silver only.

(4) By letter dated the 17th of January 1925 the plaintiff informed the defendants of the said deficiency, and demanded the return of Rs. 1,000. The defendants have neglected and failed to repay the said sum or any part thereof.

(5) By reason of the breach of warranty and representation contained in paragraph 1 hereof the plaintiff has suffered damage and claims Rs. 1,000 and interest thereon at the rate of 6 per cent. per annum as from the 3rd of December 1924.

[*Note.*—If the plaintiff was buying this silver for the purpose of fulfilling a contract which he had already entered into with a third party, and had so informed the defendants at the time of the contract, he will have a claim for special damage. He must then plead as part of the contract that he informed the defendants at the time of the sale that he was buying for the purpose of fulfilling a contract he had already entered into at a higher price than Rs. 5 per tola. The terms of that contract as communicated must be set out. In the relief the special damages for loss of profit must be claimed separately.]

No. 2-A.—MONEY PAID IN MUTUAL MISTAKE OF FACT

1. The plaintiff carries on his business at Bareilly and is a purchaser of silver in bulk. The defendants are a firm in Napier Street in Calcutta, who supply silver in bulk.

2. On the 10th of December 1924 the defendants by letter addressed to the plaintiff offered him 20 bars of metal which they stated would assay at 1,500 tolas of fine silver. The price per tola was Rs. 5.

3. The plaintiff by letter dated the 18th December agreed to buy the said bars of metal, provided the defendants would procure the certificate of one E. F., an assayer, that the said bars in fact did contain fine silver of the weight of 1,500 tolas. The defendants by letter of the 23rd of December 1924 agreed to this condition and the plaintiff by letter, dated 28th of December 1924, sent to the defendants a cheque for Rs. 7,500 on the Bareilly branch of the Allahabad Bank as payment for the said bars of metal. The said cheque was duly honoured.

4. On the 20th of January the said E. F., certified that the said bars of metal contained 1,300 tolas of fine silver only.

5. By letter, dated the 20th of January 1925 the plaintiff demanded the return of Rs. 1,000 paid by him under mutual mistake of fact, but the defendants have not paid the sum or any part thereof.

6. By reason of the premises the plaintiff has suffered damage and has overpaid to the defendants the sum of Rs. 1,000 as aforesaid. Plaintiff claims Rs. 1,000 and interest at the rate of 6 per cent per annum as from the said 28th December 1924.

No. 3.—ACCOUNTS STATED.

(Title.)

On the (date) the accounts between the plaintiff and the defendant were investigated by them and a balance of Rs. _____ was then found to be due from the defendant to the plaintiff, to which balance the defendant then agreed verbally (or, in writing signed by him and dated _____).

(As in paras. 4 and 5 of Form No. 1.)

(The plaintiff claims the said sum of Rs. _____)

ANOTHER FORM.

(Title.)

On the (date) the plaintiff sent the defendant full particulars of the accounts between the plaintiff and the defendant showing a balance of Rs. _____ due from the defendant to the plaintiff and the defendant in a letter written to the plaintiff on (date) and signed by the defendant admitted the said balance.

(*As in paras. 4 and 5 of Form No. 1.*)

The plaintiff claims the said sum of Rs.

No. 4—GOODS SOLD AND DELIVERED.

(*Title.*)

1. On the day of 19—,
the plaintiff sold and delivered to the defendant (*sundry
articles of house-furniture*), but no express agreement was
made as to the price, and the defendant refuses to pay
anything.

2. The reasonable prices of the said articles respectively, were as follows :—

(*As in paras. 4 and 5 of Form No. 1.*)

The plaintiff claims Rs. , or in the alternative
such amount as the Court may find reasonable at the
date of the said sale. (a)

No. 5.—SUIT ON A BILL OF EXCHANGE.

(*Title.*) *

1. On the day of the plaintiff drew a bill
of exchange on the defendant for Rs. payable to the
plaintiff or order three months after date, (*or, " on
demand, " or as the case may be*), and the defendant
accepted the said bill.

(a) The plaint for this case given as No. 4 in the Code is
also a poor specimen of pleading. A plaintiff in such a case
would in England be compelled by an order in Chambers to
give particulars of each article, and would not be allowed to
allege a lump sum. The defendant could not possibly know
what he was to meet unless he knew the sum claimed for each
article.

2. On the (date when the bill became due). A B was the holder of it and presented it for payment to the defendant at his place of business (state address) and the defendant dishonoured the same by refusing to pay it. The plaintiff thereupon paid the amount due upon the said bill to the said A. B.

[As in paras. 4 and 5 of Form No. 1.]

The plaintiff claims Rs.

Particulars.

Principal due on the said bill	Rs.
--------------------------------	-----

Interest thereon.....	Rs.
-----------------------	-----

Total amount due.....	Rs.
-----------------------	-----

The plaintiff also claims interest on the above amount at per cent. per annum from the date of this suit until payment or judgment.

No. 6.—SUIT ON A CHEQUE.

(Title.)

1. The plaintiff is the holder of a cheque for Rs. dated , drawn by X upon the Bank, payable to Y or order and endorsed by Y to the defendant and by the defendant to the plaintiff.

2. On the day of the said cheque was duly presented for payment at the said Bank by the plaintiff and was dishonoured.

3. On the day of the plaintiff by a letter dated gave notice of the said dishonour to the defendant but the defendant has not paid the amount of the said cheque to the plaintiff.

[As in paras. 4 and 5 of Form No. 1.]

The plaintiff claims :—

Amount of the said cheque Rs.

Interest (as in Form No. 5).

No. 7.—CONVERSION OF A SHAHJOG HUNDI.

(Facts taken from *Ganesdas v. Lachminarayan*, 1. L. R. 18 Bom. 570).

(Title.)

1. On the 8th December, 1893, at Sholapur the plaintiff bought from one A a *hundi* drawn by the said A upon the defendant for Rs 1,000. The said *hundi* contained a direction to the drawee to pay the said sum "to the *shah*."

2. The custom of merchants in dealing with *hundis* made payable to the *shah* is that such *hundis* are only paid to a respectable person of substance and known in the bazaar; and that, if such a *hundi* is presented for payment by a holder who is not known to the drawee, payment is not made until the drawee has made due inquiry and has ascertained that the holder is a person of that description. (a)

3. On the 8th December, 1893, the plaintiff endorsed the said *hundi* to one Ramrukh Ramkisson, his agent in Bombay; and posted it in a registered cover from Sholapur to the said Ramrukh Ramkisson to his address in Bombay for collection.

4. The said *hundi* was never received by the said Ramrukh Ramkisson. It was presented for payment on the 9th December, 1893, to the defendant in Bombay by a person who gave his name as Dwarkadas Lalji. The defendant thereupon paid the amount of the said *hundi* to that person and returned it to the said A with a receipt for payment written on it.

(a) This paragraph is hardly necessary now that mercantile usage concerning *shahjog hundis* has been judicially recognised. It is introduced as an illustration of the way in which to plead a mercantile custom?

When the said *hundi* was presented for payment as stated in paragraph 4, the name Ramrukh Ramkisson had been erased from the indorsement placed upon it by the plaintiff as stated in paragraph 3, but in such a manner that it was plain that words had been erased from the said indorsement; and the name Dwarkadas Lalji had been written over the said indorsement in handwriting different from that of the plaintiff's said indorsement. The said alterations of the said indorsement were not made by or by the authority of the plaintiff.

6. The person to whom payment was made as stated in paragraph 4 was not a *shah* and was not known to the defendant and the defendant did not make any inquiry about the position or identity of the said person before making payment to him.

7. On the 14th December 1923, the plaintiff heard that the said *hundi* had been paid, and on the next day by his agent, the said Ramrukh Ramkisson, he demanded the amount of the said *hundi* from the defendant at Bombay. The defendant verbally refused the said demand.

8. The defendant has wrongfully deprived the plaintiff of the said *hundi* and of the money represented by it and has converted the said *hundi* to his own use.

[As in paras. 4 and 5 of Form No 1.]

The plaintiff claims Rs. 1,000, the amount of the said *hundi* and interest thereon at, per cent. from the 15th December, 1923.

[As in Form No. 6.]

No. 8.—NON-ACCEPTANCE OF GOODS.

(Title.)

1. On the day of 19
the plaintiff sold at auction sundry (goods) subject to

the condition that all goods not paid for and removed by the purchaser within (*ten days*) after the sale should be re-sold by auction on his account, of which condition notice was given to the defendant verbally [*or, in writing.*]

2. The defendant purchased (*one crate of crockery*) at the said auction for Rs.

3. The defendant did not take away or pay for the said goods before the date mentioned in paragraph 4 although ten days from the date of the said sale had then elapsed.

4. On the day of 19 the plaintiff re-sold the said goods on account of the defendant, by public auction, for Rs.

5. The expenses of such re-sale amounted to Rs.

(*As in paras. 4 and 5 of Form No. 1.*)

The plaintiff claims Rs. being the difference on the re-sale, and Rs. the said expenses.

No. 9.—NON-DELIVERY OF GOODS SOLD.

(*Title.*)

1. On the day of 19 , the plaintiff and defendant mutually agreed that the defendant should deliver (*one hundred barrels of flour*) to the plaintiff, on the day of 19 , and that the plaintiff should pay therefor Rs. on delivery.

2. On the last-mentioned date the plaintiff was ready and willing, and offered to pay the defendant the said sum upon delivery of the goods.

3. The defendant has not delivered the goods, and

the plaintiff has been deprived of the profits, which would have accrued to him from such delivery.

(As in paras. 4 and of 5 Form No. 1 and Relief claimed). (a)

**No. 10.—PLAINT FOR DAMAGES FOR BREACH
OF WARRANTY.**

(Title.)

1. On the (date) the defendant sold to the plaintiff 20 maunds of gram by sample which the defendant then showed to the plaintiff

2. On the (date) 20 maunds of gram were delivered to the plaintiff by the defendant in respect of the said sale.

3. On the (date) the plaintiff inspected the said gram and discovered that it was not equal to sample in the following respects: It was worm-eaten and contained a large mixture of other grains and by reason of this, was worth Rs. less than if it had been equal to the sample mentioned in paragraph 1.

4. On the (date) the plaintiff gave the defendant notice in writing of the condition of the said gram.

(As in paras. 4 and 5 of Form No. 1.)

The plaintiff claims Rs. damages for breach of warranty.

(a) The above example [No. 14 in the Appendix to the Code] is not a good specimen of pleading. The claim for the loss of profit in paragraph 3 is unintelligible and particulars of it would have to be ordered. If the plaintiff is claiming merely loss of profit owing to a change in the market price he must allege the contract price, and the market price at the date when the defendant refused to deliver. If he claims an actual loss on a contract for re-sale which he was unable to perform he must allege full particulars of it, and also that the defendant had notice of it before he agreed to sell to the plaintiff.

ANOTHER FORM

(*Title.*)

1. On the day of , the defendant contracted in writing to sell to the plaintiff maunds of rice to be delivered at Calcutta, at Rs. per maund and in consideration of the plaintiff buying the said rice gave the plaintiff a written warranty that it was first class Burma rice.

2 The said rice was delivered at Calcutta and was not first class Burma rice.

3. The plaintiff bought the said rice from the defendant for the purpose of re-selling it at a profit with a similar warranty and so informed the defendant at the time of the said sale.

4. On the day of the plaintiff re-sold the said rice to X at the price of Rs. per maund and warranted (verbally, *or*, in writing) that it was first class Burma rice, and delivered the said rice to the said X.

5. The said X afterwards brought a suit No. in the court against the plaintiff for breach of the warranty mentioned in paragraph 4.

6. The plaintiff then gave notice on (*date*) verbally (*or*, by a letter dated) to the defendant in this suit that he was being sued by the said X, and defended the said suit.

7. On the day of judgment in the suit mentioned in paragraph 5 was given against the plaintiff in this suit with costs, and the plaintiff has paid the amount of the said judgment and costs. (*a*)

(a) A warranty in the strict sense of the term means an agreement collateral to a contract, a breach of which does not entitle the party to, whom the warranty was given to repudiate

(As in paras. 4 and 5 of Form No. 1).

The plaintiff claims Rs.

Particulars.

Loss of profit on the re-sale mentioned in paragraph 4 Rs
Amount of the judgment mentioned in paragraph 7 Rs.
Costs of the said X in the suit men- tioned in paragraph 5 Rs.
Plaintiff's costs of defending the said suit Rs.

the contract, but only entitles him to damages for breach of the warranty. In pleading any express warranty, it is necessary to show that there was some consideration for it. This can be done by pleading that "the defendant by making the warranty induced the plaintiff to enter into the contract", or by pleading that the warranty was given "in consideration of the plaintiff's entering into" the contract with the defendant.

A condition is a term of a contract, a breach of which entitles the party injured thereby to repudiate the contract; or to accept performance, and to treat the condition as a warranty and sue for damages for breach of it. Nearly all the implied warranties in the Indian Contract Act are conditions according to English Law; and in a doubtful case, a pleader would be well advised to plead in the alternative, which he can do by pleading as follows :—

"It was a condition of the said contract that" (*set out the alleged condition*), "alternatively the plaintiff says that the defendant induced the plaintiff to make the said contract by warranting that

**no. 11.—AGAINST AN AGENT FOR BREACH OF
WARRANTY OF AUTHORITY.**

(Facts taken from *Ganpat Prasad v. Sarju*, 34° Alld., 168).

(Title).

1. On the 10th December, 1907, one Munna Lal, a merchant residing at Katni, authorised the defendant to sell for him as his agent 500 bags of wheat, the property of the said Munna Lal and stored at Badausa, in the district of Banda, and the said Munna Lal directed the defendant not to sell the said wheat for less than 9½ seers to the rupee.

2. On the 25th December, 1907, the defendant, as agent for the said Munna Lal, sold the said 500 bags of wheat to the plaintiff at the rate of 9 seers and 6 chhataks to the rupee. It was agreed verbally that delivery should be made within eight days after the said date, and the plaintiff paid Rs. 51 to the defendant in part payment of the price. At the time of the said sale the plaintiff did not know that the defendant had been forbidden by the said Munna Lal to sell the said wheat at a rate less than that of 9½ seers to the rupee.

3. On the 2nd January, 1908, the said Munna Lal stopped the delivery of the said 500 bags of wheat to the plaintiff. The plaintiff thereupon sued the said Munna Lal in the court of _____ for breach of contract and the said suit was dismissed with costs, amounting to Rs. 252-1-0, on the ground that the defendant had no authority to sell below the rate stated in paragraph 2.

4. The plaintiff incurred a loss amounting to Rs. 424 in consequence of the failure of the defendant to deliver the said 500 bags of wheat to him. Particulars of the said sum are e.g., to the purchase of 500 bags of wheat

of the same quality on the 3rd of January 1908, at (*state price, etc., and difference between prices*).

(*As in paras. 4 and 5 of Form No. 1*).

The plaintiff claims :—

1. Repayment of the sum of Rs. 51 paid by him to the defendant.
2. Rs 252-1-0, the defendant's costs in the suit brought by him against the said Munna Lal.
3. Rs. plaintiff's costs in the said suit.
4. Rs. 424, the amount of damages stated in paragraph 4 (a).

**No. 12—BY PAKKA ARHATIA AGAINST HIS
"PRINCIPAL."**

1. The plaintiffs carry on a *pakki arhat* agency by the sale of grain at Amroha, and have acted as *pakki arhatias* for the defendants in selling grain at Amroha since 1900; and the defendants have always paid the plaintiffs their commission and all other charges according to the custom of the market at Amroha stated in paragraph 12.

2. In Amroha it is difficult to sell bajra unless it is of the same quality and kind as that grown in the district of Amroha (hereinafter called "Amroha bajra"), and this was known to the defendants before the 8th September, 1916. It has always been the course of business between the plaintiffs and the defendants that an order to sell bajra in Amroha, unless some special quality or kind is specified, is understood to refer to Amroha bajra.

(a) In this case the plaintiff ought to have sued the defendant Munna Lal in one suit. He lost his costs of the second because he had not done so.

3. According to the scale of quantity recognised in the Amroha market, one wagon means 200 maunds and one bag means 2 maunds.

4. On the 8th of September, 1916, the defendants instructed the plaintiffs by telegram to sell 1,200 maunds of bajra. On the 17th September they instructed the plaintiffs by telegram to sell 600 bags of bajra, and by letter, dated the 27th September, they instructed the plaintiffs to sell 4 wagons of bajra. No particular kind or quality of bajra was specified in either of the said telegram or in the said letter.

5. Relying on the defendant's instructions as stated in paragraph 4, and in the belief that they referred to Amroha bajra, the plaintiffs sold by verbal contracts the following quantities of Amroha bajra on the following dates and at the following rates :—

- (a) On the 9th September, 1916, 2 wagons to K. K. L. and 4 wagons to H. R. C. L. at the rate of 12 seers 2 ch. per rupee.
- (b) On the 16th of September, 1916, 2 wagons to S. R. S. S. one wagon to R. S. A. S., one wagon to R. S. R. R., one wagon to J. N. N. L., one wagon to S. L. B. L., at the rate of 12 seers per rupee.
- (c) On the 29th of September, 1916, one wagon to R. S. R. R., one wagon to K. L. M. B. L., one wagon to J. W. J. S. C., one wagon to D. D. B. L., at the rate of 12 seers 4 ch. per rupee.

All the said contracts were made on the terms that delivery should be given between the 9th and 16th of December, 1916; and earnest-money was paid by each of the buyers to the plaintiffs, namely, *(set out the amounts and names)*.

6. The plaintiffs made each of the contracts of sale mentioned in paragraph 5 as *pakka arhatias*, and thereby, as the defendants knew, became personally responsible for the performance of the said contracts of sale.

7. When each of the said sales was made the plaintiff informed the defendants by telegram, and confirmed the information by letters despatched on the 10th, 19th and 30th September, 1916. The defendants replied by letters dated respectively the 12th, 21st, and 25th September, 1916, agreeing to the terms of the said sales.

8. The defendants did not send any bajra direct to the plaintiffs, but by letter dated they instructed the plaintiffs to take delivery of bajra from N. K. J. N., a grain merchant in Amroha, and informed the plaintiffs that such bajra had been sent by the defendants to the said N. K. J. N. for delivery in respect of the contracts mentioned in paragraph 5.

9. The plaintiffs went to the store of the said N. K. J. N., on . The bajra which the said N. K. J. N. then tendered to them on behalf of the defendants was not Amroha bajra, and when the buyers mentioned in paragraph 5 inspected the said bajra, each of them refused to accept it because it was not Amroha bajra. The plaintiffs thereupon notified the defendants by letter dated , and requested the defendants to send Amroha bajra for delivery to the said buyers, which the defendants in a letter dated to the plaintiffs refused to do, and did not do by the 16th December.

10. On the 9th December, 1916, the buyers mentioned in paragraph 6 verbally demanded from the plaintiff delivery of the bajra sold to them before the 16th of December.

11. On the 16th of December, 1915, the rate in the Amroha market was 10 seers and 5 ch. per rupee for

Amroha bajra and the plaintiffs on the same day returned the earnest monies set out in paragraph 6 to each of the said buyers and settled with each of them respectively by paying him the difference between the said price and the contract price stated in paragraph 6 and so informed the defendants in a (registered) letter dated .

12. The practice and custom of the Amroha market in the case of forward contracts for the delivery of grain is that a commission of rupees two per cent. of the price is paid to the *pakka arhatia* who undertakes the sale, and one anna and six pies per cent. of the price is paid for charitable purposes, namely the Amroha *Gaushala*.

13. The plaintiffs paid the said percentage in respect of each of the sales mentioned in paragraph 6 and so informed the defendants in a letter dated

(As in paras. 4 and 5 of Form No. 1.)

The plaintiffs claim Rs. 2,632.

Particulars.

Rs.

- (1) Difference between 6 wagons of bajra
at 12 seers and 2 ch. and at 10
seers 5 ch.
 - (2) Difference between 6 wagons of bajra
at 12 seers and at 10 seers 5 ch. ...
 - (3) Difference between 4 wagons of bajra
at 12 seers 4 ch. and at 10 seers
5 ch.
 - (4) Plaintiffs' Commission at Rupees two
per cent. on Rs.
 - (5) Anna one pies six per cent. on Rs.
-

No. 13.—USE AND OCCUPATION. (a)

(Title).

1. The defendants occupied the (house No. Street), by permission of the plaintiff from the day of 19 until the day of 19. No arrangement was made as to payment for the use of the said premises. Alternatively the defendant took possession of them and occupied them wrongfully.

2. The rental value of the said premises is Rs. per mensem.

(As in paras. 4 and 5 of Form No. 1).

The plaintiff claims the sum of Rs. the said rental value for the said period as money due for use and occupation or alternatively as mesne profits during such wrongful occupation.

No. 14.—WRONGFUL DISMISSAL

(Title.)

1. On the day of 19, the defendant verbally agreed to employ the plaintiff in the capacity of foreman for the term of (one year) and to pay him Rs. per month.

2. On the day of 19, the plaintiff entered upon the service of the defendant and, has

(a) "Use and occupation" is often misunderstood. It is claimed as money due under implied contract for temporary occupation without an express agreement of tenancy or fixed rent. It must be claimed on the basis of a rental value and should always be accompanied by an alternative claim for mesne profits, i. e., damages by trespass in the event of consent being denied.

been, and still is, ready and willing to continue in such service.

3. On the day of 19 , the defendant wrongfully discharged the plaintiff without notice and without wages.

The plaintiff claims :—

Rs. damages.

**No. 15 —RESCISSION OF A CONTRACT ON THE
GROUND OF MISREPRESENTATION.**

(Title.)

1. On the 23rd day of March, 1924 at an interview between the plaintiff and defendant at 10 Wilson Street, Cawnpore, the defendant verbally represented to the plaintiff that a certain plot of land, situated in mauza Behari Lal, Mirzapur, and belonging to him, the defendant, was of an area of 10 bighas.

2. The plaintiff was thereby induced to purchase the same at the price of Rs. in the belief that the said representation was true, and signed an agreement of which the original is hereto annexed. But the land has not been transferred to him.

3. On the day of 19 , the plaintiff paid the defendant Rs. as part of the purchase-money.

4. On the 6th of April 1924, the plaintiff went to mauza Behari Lal, Mirzapur, and inspected the said land. The said land on measurement was found to be 5 bighas 8 biswas only and is of no use or value to the plaintiff.

(As in paras. 4 and 5 and of Form No. 1.)

7. The plaintiff claims—

(1) Rs with interest from the
 day of 19

- (2) that the said agreement be delivered up and cancelled.

**No. 16—AGAINST A COMPANY FOR REPAYMENT
OF MONEY PAID FOR SHARES AND FOR
RECTIFICATION OF THE REGISTER
OF SHAREHOLDERS ON THE
GROUND OF MISREPRESENTATION.**

(Title.)

1. The defendant Company was incorporated in India on (date) and has its registered office at (place) and A. B. C. were the directors or, were the promoters) of the defendant company on the date mentioned in paragraph 2.

2. On the (date) the said directors issued a prospectus relating to the defendant company.

3. On the (date) the plaintiff received a copy of the said prospectus.

4. On the (date) the plaintiff, in consequence of a belief that the statements in the said prospectus were true and complete, subscribed for ten shares of Rs. 100 each.

5. The said shares were allotted to the plaintiff on the (date) and the plaintiff paid Rs. per share.

6. The said prospectus was not true in the following particulars :—

(a) Paragraph 10 of the prospectus stated.....
but in fact.....

(b) Paragraph 15 of the prospectus stated.....
but in fact.....

7. When they issued the said prospectus the said directors had no reasonable grounds for believing that the statements set forth in paragraph 6 were true. (a)

8 The said prospectus did not state the following material facts :—

(a)

(b)

The said facts were known to the said directors at the time when they issued the said prospectus. (b)

9. Since the date mentioned in paragraph 5, the plaintiff has paid the following calls on the shares mentioned in paragraph 5 :—(*state amounts and dates of payment.*)

10. On the (*date*) the plaintiff discovered the truth about the facts stated in paragraphs 7 and 8, and by letter (*date*) to the defendant Company demanded the repayment of the sums stated in paragraphs 5 and 9, and offered to return the shares in respect of which the said sums were paid.

(*As in paras. 4 and 5 of Form No. 1.*)

The plaintiff claims Rs. , being the amount of the sums paid by him as stated in paragraphs 5 and 9, and that the register of shareholders in the defendant Company be rectified by striking the plaintiff's name off the said register.

(a) See the Indian Contract Act, S. 18 (1) and the Indian Companies Act, S. 100.

(b) See the Indian Contract Act, S. 18 (2) and the Indian Companies Act, S. 93.

No. 17.—BREACH OF COVENANT.

(Title)

1. On the day of 19 , the defendant, by a registered instrument, let to the plaintiff (the house No. , Street), for the term of years, and thereby contracted with the plaintiff, that he, the plaintiff, and his legal representatives should quietly enjoy possession thereof for the said term.

2. All conditions were fulfilled and all things happened necessary to entitle the plaintiff to maintain this suit.

3. On the day of 19 , during the said term, *E. F.*, who was the lawful owner of the said house, lawfully evicted the plaintiff therefrom, and still withholds the possession thereof from him.

4. The plaintiff was thereby prevented from continuing the business of a tailor at the said place, and was compelled to expend Rs. in moving, (and lost the costume to *G. H.* and *I. J.* by such removal).

(*As in paras. 4 and 5 of Form No. 1, and Relief claimed*)

No. 18.—FRAUD BY AGENT.

(Title).

1. On (*date*) at (*place*) the plaintiff verbally employed the defendant to buy coal for him at (*place*), and agreed to pay the defendant commission at the rate of Rupees for his services.

2. On (*date*) the defendant, as agent for the plaintiff, bought for the plaintiff wagon loads of maunds each of coal from Messrs. *X* and Coy at (*place*) for (*price*)

3. When making the said purchase the defendant corruptly, and without the plaintiff's knowledge or consent, accepted from the said Messrs. *X* and Coy. a

commission of Rupees per wagon load of coal
(or, a sum of Rupees).

4. The defendant has not paid the said sum to the plaintiff, or otherwise accounted to the plaintiff for the said sum.

(As in paragraphs 4 and 5 of Form No. 1).

The plaintiff claims the said sum of Rupees

No. 18A.—MISREPRESENTATION OF CREDIT.

(Title).

1. On the 1st of June 1924 one E. F. applied to the plaintiff for a loan of Rs. 1,000 and gave the name of the defendant as a man willing to vouch for his solvency and credit.

2. By letter, dated the 2nd of June 1924 the plaintiff informed the defendant of the request for a loan of Rs. 1,000 by E. F., and enquired whether such loan safely be made to the said E. F.

3. By letter, dated the 10th of June, the defendant replied that he had known the said E. F. for 20 years, that he owned a half share in a prosperous business in Calcutta and was a customer of the Allahabad Bank and in good repute with them.

4. In the belief that each and every of these representations was true the plaintiff lent on the 1st of July 1924 the E. F. the said sum of Rs 1000.

5. On the 5th of August the said E. F. applied to be made an insolvent and was duly adjudicated bankrupt by Court on the 10th of September 1924.

6. Each and every representation contained in paragraph 3 hereof was untrue to the knowledge of the defendant, or alternatively was made recklessly or

carelessly without belief in the truth of any one of them.

Particulars.

(a) The defendant had not known E. F. for 20 years but on the contrary for a few months only.

(b) The defendant had not a half or any share in any business in Calcutta.

(c) The defendant had an account in the Allahabad Bank but to the knowledge of the defendant the account was overdrawn and a cheque paid by the said E. F. to the defendant on the 1st of June 1924 had in fact been dishonoured by the Bank.

7. By reason of the premises the plaintiff has suffered damage and has wholly lost the Rs. 1,000 advanced as aforesaid. No dividend will be declared in the bankruptcy of the said E. F.

The plaintiff claims Rs. 1,000 as damages and interest thereon at 6 per cent. from the 1st of July 1924.

**No. 19.—AGAINST DIRECTORS OR PROMOTERS
FOR DAMAGES FOR FRAUD.**

(Title.)

1. On (date) the defendants issued a prospectus stating that a company, to be called the Co., Ltd., was about to be formed, and inviting the public to subscribe for shares in the company

2 and 3. (*As in paragraphs 3 and 4 of Form No. 15.*)

4 The said Company was registered at (place) on (date) under the Indian Companies Act, 1913.

5 and 6. (*As in paragraphs 5 and 6 of Form No. 15.*)

7 When they issued the said prospectus, the defendants knew that the statements set forth in para-

graph 6, were not true (or, did not believe that the said statements were true).

8 and 9. (*As in paragraphs 8 and 9 of Form No. 15 (a).*)

10. On (*date*), in the Court of _____, an order was made for winding up the said company.

Or

On (*date*) it was resolved at a meeting of the shareholders of the said company that the said company should be wound up, and (*name*) was appointed liquidator.

11. In consequence of the winding up of the said company the plaintiff has been obliged to pay or, has become liable to pay) Rs. _____ as a contributory in respect of the shares mentioned in paragraph 5.

12. On (*date*) the plaintiff first became aware of the truth about the facts stated in paragraphs 6 and 8.

(*As in paras. 4 and 5 of Form No. 1.*)

The plaintiff claims Rs. _____, being the amount of the sums mentioned in paragraphs 5, 9 and 11, from the defendants as damages for fraud.

No. 20.—CARRYING ON A NOXIOUS MANUFACTURE.

(*Title.*)

1. The plaintiff is, and at all the times hereinafter mentioned was, possessed of certain land called _____ situated in _____

2. Since the _____ day of _____ 19____, the defendant has wrongfully caused to issue from certain works carried on by the defendant large quantities of _____

(a) See the Indian Contract Act, S. 17 (5) and the explanation, and the Indian Companies Act, S. 93.

offensive and unwholesome smoke, and other vapours and noxious matter, which have corrupted the air, and settled on the surface of the plaintiff's said lands.

3. Thereby the trees, hedges, herbage and crops of the plaintiff growing on his said lands were damaged, and deteriorated in value, and the cattle and livestock of the plaintiff on the lands became unhealthy, and many of them were poisoned and died. (*Give particulars*).

4. The plaintiff was unable to graze the said lands, and was obliged to remove his cattle, sheep and farming stock therefrom, and has been prevented from enjoying any benefit from the occupation of the said land.

5. The defendant intends, and threatens to continue to cause such smoke, vapours and noxious matter to issue from his said works.

c (As in paras. 4 and 5 of Form No 1).

The plaintiff claims an injunction to restrain the defendant from continuing to send the said smoke, fumes and other matter upon the plaintiff's said lands, and Rs. c damages for the loss of his cattle as stated in paragraph 3, and Rs. damages for injury done to his said lands.

No. 21.—OBSTRUCTING A RIGHT OF WAY

c (Title)

1. The plaintiff is, and was at the time hereinafter mentioned, the owner and occupier of a house in (*describe its situation*), and, as such, is and was entitled to a right of way for himself and his servants on foot (*or, for carts*) from his said house to the public highway known as the Lucknow-Fyzabad Road, and back, across the land of the defendant lying between the plaintiff's said house and the said road.

2. The plaintiff was, and is, entitled to the said right of way (*state how*), *e. g.*, by the enjoyment thereof openly, as of right, and without interruption for twenty years before this suit (*a*).

On the day of 19 , the defendant wrongfully obstructed the said way by placing a gate across it (*particulars of the obstruction must be given*) and has ever since continued and threatens to continue to obstruct to the same.

(*As in paras. 4 and 5 of Form No. 1*).

The plaintiff claims an injunction to restrain the defendant from obstructing the said way.

No. 22.—OBSTRUCTING A HIGHWAY

(*Title*)

1. On or about (*give approximate date*) the defendant wrongfully dug a trench and heaped up earth and stones in the public highway leading from
to
so as to obstruct it.

2. On (*date*) the plaintiff, while lawfully, passing along the said highway, fell into the said trench and broke his arm, and suffered great pain, and was prevented from attending to his business for a long time and incurred expense for medical attendance.

Particulars of expenses (*b*)

(*a*) The title to an easement must be pleaded.

(*b*) The plaintiff *must* in every plaint give full and exact particulars of all special damage claimed. It is called "special damage", but it is really "particular damages", being money actually expended or incurred. "General damages" are "at large" as it is said. That is to say, they are awarded in a lump sum, in all cases of trespass, up to a reasonable amount to cover pain and suffering, inconvenience and all "moral and intellectual damage" as it was once called, which cannot be, precisely stated in terms of money.

(As in paras. 4 and 5 of Form No. 1).

The plaintiff claims :—

(a) Rs. damages under para. 2.

(b) Rs. general damages.

No. 23.—OBSTRUCTING WATER FOR IRRIGATION.

(Title)

1. The plaintiff is and was at the time hereinafter mentioned, possessed of lands at (*say where*) and entitled to use water from a stream flowing through his said lands for irrigating his said lands.

2. On the day of 19 , the defendant by wrongfully obstructing and diverting the said stream prevented the plaintiff from taking the said water thereof for irrigating his said lands.

3. The defendant has not removed, and refuses to remove the obstruction mentioned in paragraph 2.

The plaintiff claims :—

(a) An injunction to restrain the defendant or his agents from obstructing the plaintiff's use of the said water.

(b) Damages (a)

No. 24.— INJURIES CAUSED BY CARRIER.

(Title.)

1. The defendants are common carriers of passengers by railway between _____ and _____

(a) In this case damages will be nominal for the trespass, unless actual loss can be proved to the crops, or produce, or profit from the land, in which case the plaintiff, as already explained, must contain a special paragraph setting out how such loss is made up.

2. On the day of 19 , the plaintiff was a passenger in one of the carriages of the defendants on the said railway, and had paid his fare.

3. While he was such passenger, at (*say where*) a collision occurred on the said railway caused by the negligence and unskillfulness of the defendant's servants, whereby the plaintiff was much injured, having his leg broken, his head cut, etc, (*state the special damage, if any*) and incurred expense for medical attendance, and is permanently disabled from carrying on his former business as a salesman). [*Here insert particulars of the negligence and of the special expenses*]. (a)

(*As in paras. 4 and 5 of Form No. 1.*)

The plaintiff claims Rs. , special damage, and
Rs. general damages.

— — —

**No. 25.—AGAINST A RAILWAY COMPANY FOR LOSS
OF PASSENGERS' LUGGAGE.**

(*Title*)

1. On the day of 19 , the plaintiff was a passenger on the defendant's Railway to be carried with his luggage from to and had paid his fare.

2. The defendant did not carry the plaintiff's luggage to (*destination*), but has either lost it upon the said journey or has retained it.

(*As in paras. 4 and 5 of Form No. 1.*)

(a) The precedent (No. 30) given in the Code is a shocking example of defective pleading. In every case of alleged negligence, the plaintiff must give particulars of the negligence relied upon, *e g.*, excessive speed, not keeping a lookout, not giving warning &c., &c. As already explained all particulars of special damage claimed must be stated.

The plaintiff claims the value of the said luggage which is Rs.

Particulars.

[Specify piece of luggage and its contents]

No. 26.—INJURIES FROM NEGLIGENT DRIVING.

(Title.)

1. The plaintiff is a shoemaker, carrying on business at _____
The defendant is a merchant of _____

2. On the _____ day of _____ 19____, the plaintiff was crossing X street when a motor car of the defendant was driven by the defendant's servant so negligently that it collided with the plaintiff and knocked him down.

Particulars of the acts of negligence of which the plaintiff complains.

The defendant's servant drove the said motor into X street from Y street without giving any warning, and at a dangerous pace, and did not keep a proper look-out. The brakes of the said motor car were defective (or, out of order) at the time of the said accident.

3. The plaintiff's left arm was broken and he was bruised and injured on the side and back, as well as internally. and in consequence thereof the plaintiff was for four months ill and in suffering, and unable to attend to his business, and incurred heavy medical and other expenses, and sustained great loss of business and profits

Particulars of expenses :—

(As in paras. 4 and 5 of Form No. 1.)

The plaintiff claims Rs. _____ special damages and
Rs. _____ general damages (a).

(a) The observations already made as to setting out particulars of special damage, apply to all such cases as the above.

Note.—The common allegation in these cases also is, that he was not on his proper side of the road, that he failed to apply his brakes or alternatively that if he did apply the same they were in a defective condition. It also makes for clearness if the allegations of negligence are numbered 1, 2, 3, 4, and 5.

The pleader should specify the medical and other expenses, e.g. : —

- (a) Dr. Nand Ram's bill from 23rd of
May to the 6th September ... Rs. 7
- (b) purchase of medicines, etc., during
the same period Rs.
- (c) loss of business Rs.

No. 27.—FOR MALICIOUS PROSECUTION.

(Title.)

1. The plaintiff is a (*merchant*) and carries on business as such at (*place*).

2. On (*date*) the defendant maliciously (*a*) and with out reasonable or probable cause obtained warrant of arrest from (*name*) the magistrate of (*place*) for the arrest of the plaintiff on a charge of (*state offence*). The plaintiff was arrested on the said warrant on (*date*) at (*place*) and imprisoned for ten days and had then to secure bail in the sum of Rs. _____ in order to obtain his release.

3. On (*date*) the said Magistrate dismissed the case and acquitted the plaintiff.

4. A, B and C, (*give full name*), who were customers of the defendant at the time of the events mentioned

(a) It is not necessary, as often stated and decided in India to allege that the plaintiff was innocent—*vide Balbhaddar Singh v. Badri*, P. C. 24 Ayl. L. J., 453.

in paragraph 2, hearing of the arrest and supposing the plaintiff to be a criminal, have ceased to do business with him, and the plaintiff has thereby lost profits which he would have otherwise made. The plaintiff has also suffered pain of mind and body in consequence of the facts stated in paragraph 2 and was prevented from transacting his business and was injured in his credit and incurred expense in obtaining his release from the said imprisonment and in defending himself against the said charge.

(As in paras. 4 and 5 of Form No. 1).

The plaintiff claims Rs. damages and compensation as follows :—

(a) For loss of business Rs.

(b) Expenses *(full particulars of the expenses must be given)*. (a)

No. 28.—FOR FALSE IMPRISONMENT.

(Title.)

1. On *(date)* at *(place)* the defendant imprisoned the plaintiff for two hours in the defendant's house, and then gave him into the charge of the police on a false charge of having *(state charge)*.

(a) In Precedent No. 31, in the Civil Procedure Code no particulars are given and no court thought to allow evidence of expenses to be given unless the nature and the amount of each item of the expense is stated in the particulars. The plaintiff also cannot prove the loss of any particular customer unless that customer's name is stated in the plaint. The plaintiff might, however, without giving the names of customers whom he may have lost, establish a claim for loss of business by showing that his receipts had fallen in consequence of his imprisonment and prosecution.

2. The defendant thereby caused the plaintiff to be kept in custody by the police till (*date and hour*), when the police officer in charge of the police station at (*place*) released the plaintiff. (*a*)

(*As in paras. 4 and 5 of Form No. 1.*)

The plaintiff claims Rs. for loss of business or wagons, (*particulars of this should be given*) and Rs. for the pain of body and mind, and loss of reputation and inconvenience and discomfort suffered by him.

ANOTHER FORM.

On the day of 19 , the defendant Company by its servants assaulted the plaintiff, by dragging him out of a railway carriage of the defendant Company in which the plaintiff was lawfully travelling as a passenger from to , having paid his fare, and wrongfully imprisoned him at (*station*) for (*state time*).

(*As in paras. 4 and 5 of Form No. 1.*)

No. 29.—FOR MALICIOUS PROSECUTION AND FALSE IMPRISONMENT. (b)

(*Title.*)

On (*date*) the defendant maliciously and without reasonable and probable cause, imprisoned the plaintiff and handed him over to a policeman, on a charge of (*state offence*). The plaintiff was thereupon detained by

(a) See the Criminal Procedure Code, S. 69.

(b) The distinction between a suit for false imprisonment and one for malicious prosecution is stated thus by Wills, J., in *Austin v. Dowling*, (L R. 5, C. P. at page 539).

“ How long, did that state of false imprisonment last ? So long of course, as the plaintiff, remained in the custody of a

the police till (*date*), when he was brought by the police before (*name*), a Magistrate of (*place*), whereupon the said magistrate remanded the plaintiff until (*date*), when the plaintiff was again brought before the said magistrate. The said magistrate then dismissed the charge and discharged the plaintiff from custody.

(*As in paras. 4 and 5 of Form No. 1.*)

No. 30.—WRONGFUL DETENTION.

(*Title*)

1. On the day of 19 , the plaintiff owned the goods mentioned in the schedule hereto annexed, the estimated value of which is Rs.

ministerial officer of the law, whose duty it was to detain him until he could be brought before a judicial officer. Until he was so brought before the judicial officer, there was no malicious prosecution. The distinction between false imprisonment and malicious prosecution is well illustrated by the case where, parties being before a magistrate, one makes a charge against another, whereupon the magistrate orders the person charged to be taken into custody, and detained until the matter can be investigated. The party making the charge is not liable to an action for false imprisonment because he does not set a ministerial officer in motion, but a judicial officer. The opinion and judgment of a judicial officer are interposed between the charge and the imprisonment. There is, therefore, at once a line drawn between the end of the imprisonment by the ministerial officer and the commencement of the proceedings before the judicial officer." Therefore, if the plaintiff after having been imprisoned by, or by the directions for, the defendant, has been remanded by a magistrate or other judicial officer and subsequently discharged, the plaintiff ought to sue, and claim damages, both for false imprisonment and for malicious prosecution. (See the note in, Bullen & Leake, 6th Edition, page 498).

2. , Before the commencement of this suit, namely on the day of 19 , the plaintiff demanded the same from the defendant, but he wrongfully refused to deliver them.

(As in paras. 4 and 5 of Form No. 1).

3. The plaintiff claims—

(1) delivery of the said goods, or Rs. their value.

(2) Rs. damages for their detention.

The schedule, above-mentioned.

No. 31.—FOR CONVERSION OF GOODS.

(Facts taken from *Milne v. Leisler*, 7 H. and N. 786 ; 158 English Reports, 686).

(*Title*).

(1) On the 1st April, 1924, one A came to the plaintiff (*state where*), and fraudulently represented that he was an agent for X. & Co., and that he was authorised to buy for the said X. & Co., 50 *thans* of cotton cloth from the plaintiff on one month's credit,

(2) The plaintiff believed the said representation, and on (*date*) sold and delivered 50 *thans* of cotton cloth to the said A as agent for the said X & Co.

(3) The said A was not authorised by the said X & Co. to buy any goods from the plaintiff on their behalf and did not take delivery of the said cotton cloth as agent for the said X. & Co., and on or about the 4th April, 1924, he wrongfully sold and delivered the said cotton cloth to the defendants.

(4) By letter, dated 6th April, 1925, the plaintiff demanded the said cotton cloth from the defendants, and by letter, dated 7th April, 1924, the defendants

refused to surrender the said cotton cloth to the plaintiff

(As in paras. 4 and 5 of Form No. 1).

The plaintiff claims :—

(As in Form no 30)

**No. 82.—AGAINST A FRAUDULENT PURCHASER
AND HIS TRANSFEREE WITH NOTICE.**

(Title.)

1. On the day of '19 , the first defendant falsely represented to the plaintiff that he was solvent; and worth Rs. over all his liabilities

2. The plaintiff was thereby induced to sell and deliver to the first defendant one hundred boxes of tea, the estimated value of which is Rs.

3. At the time of making the said representations the first defendant was insolvent, and knew himself to be so.

4. The first defendant afterwards sold the said goods to the second defendant who at the time of the said sale had notice of the falsity of the representation by which the first defendant had obtained the said goods.

(As in paras. 4 and 5 of Form No. 1).

5. The plaintiff claims

(1) Delivery of the said goods, or the value thereof,
and

(2) Rs. compensation for the detention
thereof.

No. 33.—INJUNCTION TO RESTRAIN NUISANCE.

(Title.)

1. The plaintiff is, and at all the times hereinafter mentioned was, the absolute owner of the house known as No. 1, Middleton Street, Calcutta.

2. The defendant is, and at all the said times was, the absolute owner of a plot of ground in the said street.

3. On the day of 19 ; the defendant erected upon his said plot a slaughter-house and still maintains the same ; and from that day until the present time has continually caused cattle to be brought and killed there and has caused the blood and offal to be thrown into the street opposite the said house of the plaintiff

4. In consequence the plaintiff has been compelled to abandon the said house, and has been unable to let the same.

5. The defendant threatens and intends, unless restrained from so doing, to continue the said nuisance.

(As in paras. 4 and 5 of Form No. 1).

The plaintiff claims (a that the defendant be restrained by injunction from committing or permitting the said nuisance.

and (b) Rs. being the rent of the said house from the date mentioned in paragraph 3 the institution of this suit and damages on the same basis till the said nuisance is stopped by the defendant.

No. 34.—DEFAMATION.

(Title.)

1. On (date) the defendant, falsely and maliciously wrote or spoke and published of and con-

cerning the plaintiff in a letter to, (name) the Manager of the _____ Branch of the _____ Bank, (or, " in the presence of _____ and _____ and others whose names are at present unknown to the plaintiff ") the words following, that is to say, " He " meaning the plaintiff, " has been twice through the hoop "

2 By the said words the defendant meant and was understood to mean that the plaintiff had twice been through an insolvency court a).

(As in paras. 4 and 5 of Form No. 1).

The plaintiff claims Rs. _____ damages. .

No. 35.—ADMINISTRATION BY CREDITOR ON BEHALF OF HIMSELF AND ALL OTHER CREDITORS.

(Title)

1. *E. F.*, late of _____ was at the time of his death, and his estate still is, indebted to the plaintiff in the sum of Rs. _____

2. The said *E F*, died on or about the _____ day of _____ By his last will, dat-d the _____ day of _____, he appointed *C. D.* his executor (or devised his estate in trust, etc., or died intestate, as the case may be).

3 The said will was proved by the said *C. D.* (or letters of administration were granted on, etc.).

4. The said *C. D.* has possessed himself of the property of the said *E. F.* and has not paid the plaintiff his said debt.

(As in paras. 4 and 5 of Form No. 1).

The plaintiff claims that an account may be taken of the property of the said *E F* deceased, and that the

(a) This "innuendo" is unnecessary, if the meaning of the words is plain.

same may be administered under the decree of the Court.

**No. 36.—FOR A DECLARATION THAT A PURCHASE
WAS A BENAMI TRANSACTION, AND TO RECOVER
TRUST PROPERTY.**

(Title.)

1. The plaintiffs are trustees of the trust mentioned in paragraph 5 and sue as such. The first defendant is also a trustee of the said trust. The second defendant is sued as owner of the village of Sadikpur mentioned in paragraphs 2 and 4 and also on account of the facts stated in paragraph 10. The third defendant is sued as owner of the village of Pali Khurd mentioned in paragraphs 2 and 4.

2. By an instrument of transfer dated 19th June, 1887, Fateh Chand, a zamindar in the district of Etawah, mortgaged to Abdul Kafil, a pleader of Etawah, three villages, namely, Pali Kalan, Pali Khurd and Sadikpur, described in the schedule hereto, for Rs. 50,000 with interest at annas, fourteen per cent. per month.

3. The said mortgage was taken by the said Abdul Kafil on behalf of Abdul Jalil, a pleader of Cawnpore, and was always held by him *benami* for the said Abdul Jalil.

4. On the 31st of May 1896, Gaya Prasad, a *rais* and banker of Etawah, purchased the said village of Pali Kalan; on the 28th of July 1892, the third defendant purchased the said village of Pali Khurd, and on the 20th of December, 1906, the second defendant purchased the said village of Sadikpur,

5. On the 16th of July, 1899 the said Gaya Prasad died, and by his will dated 15th of July, 1899, he

bequeathed "to the plaintiffs and the first defendant certain property, including his interest in the said village of Pali Kalan and a debt of Rs. 14,000 due to him by the said Abdul Jalil, upon trust for certain charities named therein and by his said will he appointed the first plaintiff chairman of a committee of trustees nominated in his said will.

6. [*Probate of the will or as the case may be, e.g., the plaintiffs and the first defendant took possession of the said property in execution of trusts of the said will.*]

7. At a meeting of the said trustees held on the 1st March, 1900, the first defendant was appointed Vice-Chairman of the said committee of trustees and on the 30th of June, 1900, they executed in his favour a power of attorney authorising him to act on their behalf in any litigation for the purposes of the said trust.

8. On the 3rd June, 1902, the said Abdul Jalil died leaving Musammat Safdari Begum and Musammat Zabunnissa his widows and legal representatives.

9. On the 1st November, 1904, the said trustees in a suit No. 2199 in the court of the District Judge of Etawah obtained a decree against the estate of the said Abdul Jalil for the debt of Rs. 14,000 mentioned in paragraph 5 and on 12th December, 1904, it was ordered by the court that the said mortgage of 19th June, 1887, should be sold in execution of the said decree.

10. On the 25th of January, 1905, at the execution sale held in pursuance of the said order of 12th December, 1904, the second defendant brought the said mortgage for Rs. 3,115. When he brought it the second defendant was acting on behalf of the first defendant and he thenceforth held and still holds the said mortgage *benami* for the first defendant.

(*As in paras. 4 and 5 of Form No. 1.*)

The plaintiffs claim :—First a declaration that the purchase of the said mortgage on the 24th January, 1905, by the second defendant was made *benami* for the first defendant. Secondly, a declaration that the first defendant holds the said mortgage, in so far as it affects the said village of Pali Kalan, as a trustee and for the benefit of the trust created by the will of the said Gaya Prasad. Thirdly, that an account be taken of the sum now due upon the said mortgage and that the sum of Rs. 3,115, paid by the second defendant for the said mortgage and the amount found to be due upon the said mortgage be apportioned between three villages mentioned in paragraphs 2 and 4. Fourthly, that upon the plaintiffs paying into court such amount of the said sum of Rs. 3,115, as may be apportioned upon the said village of Pali Kalan, the first defendant be ordered to release the said village from all claims for any money due under the said mortgage of 19th June, 1887.

No. 37.—FORECLOSURE OF SALE.

(*Title.*)

1. The plaintiff is mortgagee of lands belonging to the defendant.

2. The following are the particulars of the said mortgage :—

(a) (*date*).

(b) (*names of mortgagor and mortgagee*).

(c) (*sum secured*).

(d) (*rate of interest*).

(e) (*property subject to mortgage*).

(f) (*amount now due*).

(g) (if the plaintiff's title is derivative, state shortly the transfers or devolution under which he claims).

(If the plaintiff is mortgagee in possession, add) :—

3. The plaintiff took possession of the mortgaged property on the day of 19 , and is ready to account as mortgagee in possession from that time.

(As in paras. 4 and 5 of Form No. 1).

The plaintiff claims—

(1) payment, or in default (sale or) foreclosure (and possession) ;

(Where Order 34, rule 6, applies.)

(2) in case the proceeds of the sale are found to be insufficient to pay the amount due to the plaintiff, then that liberty be reserved to the plaintiff to apply for a decree for the balance.

No. 38.—REDEMPTION.

(Title.)

1. The plaintiff is mortgagor of lands of which the defendant is mortgagee.

2. The following are the particulars of the said mortgagee :—

(a) (date).

(b) (names of mortgagor and mortgagee).

(c) (sum secured).

(d) (rate of interest).

(e) (Property subject to mortgage).

(f) (if the plaintiff's title is derivative, state shortly the transfers or devolution under which he claims).

(If the defendant is mortgagee in possession, add)—

3. The defendant has taken possession (or has received the rents) of the mortgaged property.

(As in paras. 4 and 5 of Form No. 1).

6. The plaintiff claims to redeem the said property and to have the same reconveyed to him, (and to have possession thereof).

No. 39.—SPECIFIC PERFORMANCE.

(Title.)

1. By an agreement dated the 10th day of March, 1924, and made between the plaintiff on the one part and the defendant on the other, the defendant contracted to sell to the plaintiff certain immoveable property therein described and referred to for the sum of Rs. 8,000.

2. On the 10th of May, 1924, the plaintiff by registered letter required the defendant specifically to perform the agreement on his part, and on the 20th of May the plaintiff at an interview with the defendant at his private house in Allahabad tendered to him a draft deed of sale for execution. The defendant thereupon verbally refused to carry out the said agreement.

3. The plaintiff has been and still is ready and willing specifically to perform the agreement on his part of which the defendant has had notice.

(As in paras. 4 and 5 of Form No. 1).

The plaintiff claims that the Court will order the defendant specifically to perform the agreement and to do all acts necessary to put the plaintiff in full possession of the said property or, to accept a transfer and possession of the said property).

No. 40.—HINDU LAW—LEGAL NECESSITY²

(Facts taken from Beni Ram against Man Singh,
I. L. R. 34 Alld., 4.)

(Title).

1. The plaintiff is a money-lender and merchant residing in . The first and second defendants are the sons of Mathura Prasad a zamindar of ' and the third and fourth defendants are the sons of the first defendant. At the date of the transaction mentioned in paragraph 2 the said Mathura Prasad and the first and second defendants were the members of a joint Hindu family, and the said Mathura Prasad was the head of the said family and the manager of its property and affairs. The second defendant was then a minor. The third and fourth defendants were born after the date of the said transaction. The said family is governed by Mitaksara law.

2. In September, 1906, the said Mathura Prasad was committed for trial to the court of sessions of district, on charges under sections and of the Indian Penal Code on the 20th of October, 1906 the said Mathura Prasad and the first defendant borrowed Rs. 2,000 from plaintiff at per cent. (state rate of interest) and by an instrument of mortgage to the same date, mortgaged the family property set out in the schedule hereto to the plaintiff to secure repayment of the said sum of Rs. 2,000 with interest as aforesaid. The said mortgage was registered in the sub-registry of on the 20th of October, 1906 by the said Janki Prasad under a power of attorney given to him by the said Mathura Prasad for that purpose.

3. The said sum of Rs. 2,000, was borrowed by the said Mathura Prasad and Janki Prasad for the purposes

of the defence of the said Mathura Prasad in the criminal case mentioned in paragraph 2, and this fact was stated to the plaintiff by the said Mathura Prasad and the first defendant before the money was lent to them.

4. The said Mathura Prasad died on the 3rd of February, 1910.

5. The sum now due under the said mortgage is Rs. 10,094-14-3.

(As in paras. 4 & 5 of Form No. 1.)

The plaintiff claims that the property set forth in the schedule hereto may be sold by the authority of the court for the purposes of realising the said sum of Rs. 10,064-3.

No. 41.—HINDU LAW—INHERITANCE.

(Facts taken from Debi Mangal Prasad against Mahadeo Prasad, 34 Alld, 234).

(Title.)

1. The plaintiff is the only son of Sheo Pratap Singh, deceased, the eldest son of Gaya Prasad Singh of Zamindar. The first defendant is the second son of the said Gaya Prasad Singh, the second, third, fourth and fifth defendants are the sons of the first defendant. The sixth defendant is the third son of the said Gaya Prasad Singh and the seventh defendant is the son of the 2nd defendant.

2. The said Gaya Prasad Singh and his said sons were the members of a joint Hindu family. The said family was governed by the Mitakshara Law and is still joint. On the day of the said Gaya Prasad Singh died leaving his widow Dulhan Sahibzad Kunwari, his said son Sheo Pratap Singh, and the plaintiff and the first and sixth defendants surviving him.

3. On the day of the said Sheo Pratap Singh, father of the plaintiff died.

4. On the 4th January, 1893 in the court of the plaintiff, being then a minor, brought a suit (No.) by his mother as his next friend for partition of the shares in the ancestral property of the said Gaya Prasad Singh against the first and sixth defendants. The said Dulhan Sahibzad Kunwari was afterwards made a defendant in that suit on her own application. At the time of the said suit the second, third, fourth, fifth and seventh defendants had not been born. In the said suit the court partitioned the said ancestral property into four shares and awarded one share to each of the parties to the said suit.

5. On the 19th November, 1900, the said Dulhan Sahibzad Kunwari died. At the date of her death she was in possession of the property set out in the schedule hereto. The said property represented the share awarded to her instead of maintenance in the suit mentioned in paragraph 4.

6. On the death of the said Dulhan Sahibzad Kunwari, the defendants took the possession of the whole of the said property, and are still in the possession of it, and claim to retain the whole of it against the plaintiff.

(As in paras. 4 and 5 of Form No. 1).

[The plaintiffs claim possession of the said property.]

42.—SUIT TO SET ASIDE AN ADOPTION.

[Facts taken from Dharam Kunwar against Balwant Singh, I. L. R. 35 Alld., 398 (P. C.)]

(Title.)

1. The plaintiff is the only widow of Raja Raghubir Singh, who was the owner of the Landhura Raj, de-

scribed in the schedule hereto, in the district of Saharanpur in the United Provinces ; and the defendant is the son of Ram Niwas, a zamindar in the said district of Saharanpur. The defendant claims to be the adopted son of the said Raja Raghubir Singh.

2. Raja Raghubir Singh died on the 25th of April 1868. On that date no child had been born to him. On or about the 12th of April 1868 he charged the plaintiff, that if after his death she gave birth to a daughter, or if she gave birth to a son and that son died, to adopt some boy to him and if that boy died during the lifetime of the plaintiff, he verbally authorised and gave power to the plaintiff to adopt another boy.

3. On the 16th of December, 1868, a son was born to the plaintiff, and that son died on the 31st of August 1870.

4. In 1877, the plaintiff, in exercise of the authority given to her as stated in paragraph 2, adopted a boy named Tofa Singh ; but that boy died in 1879.

5. In 1883, the plaintiff adopted another boy named Ram Swarup in exercise of the said authority ; but that boy died in 1885 (a)

6. On the 2nd of June, 1898, the plaintiff entered into a written agreement with the said Ram Niwas, the father of the defendant, that she might adopt one of his two sons, namely the defendant or another son named Tungal Singh.

7. On the 13th January, 1899, the plaintiff executed a deed in which it was stated that she adopted the defendant as a son to the said Raja Raghubir Singh ;

(a) The facts in paragraphs 4 and 5 are material because of the averment in paragraph 9. If it were not for that, it would not matter whether there had been earlier adoptions or not, unless the plaintiff asserted that one of the adopted sons was alive on the 13th of January, 1899.

and on the same day the said deed was registered in the registry of the district of Saharanpur.

8. The plaintiff is a purdanashin lady, and never understood the contents of the said deed of the 13th January 1899, and did not know that it purported to be a deed of adoption. When she executed the said deed she had no legal or independent advice.

9. Alternatively the plaintiff will contend that under the authority to adopt given to her by her said husband as stated in paragraph 2 the plaintiff was only given authority to adopt two sons successively to her said husband and that the said authority to adopt was exhausted when she adopted the said Ram Swarup and that the adoption of the defendant is void.

(As in paras 4 and 5 of Form No. 1.)

The plaintiff claims : -(i) a declaration that the said deed of the 13th January 1899 is void and that the defendant is not the adopted son of the said Raja Raghubir Singh (ii) that the defendant be ordered to surrender possession of the said Landhura Raj to the plaintiff. (a)

**43.—SUIT BETWEEN TWO PARTIES, EACH CLAIMING
TO BE THE ADOPTED SON OF THE DECEASED
OWNER OF MOVABLE AND IMMOVABLE PROPERTY.**

(Title.)

1. The plaintiff was born the son of Tarif Singh, caste Jaini, residing in K, and is now the adopted son of Qabul Singh deceased and the defendant is a

(a) In this plaint there was also an averment. The plaintiff never executed any deed adopting the defendant. "The signature and seal on the deed of 13th January, 1899 are not, and neither of them is the plaintiff's signature or seal"; but this plea could not be supported and was abandoned at the trial.

minor son of Chandan Lal deceased and claims to be the adopted son of the said Qabul Singh.

2. The said Qabul Singh, the said Chandan Lal and Ramji Lal (mentioned in paragraph 8) were the sons of Kanhaiya Lal deceased, caste Jaini of M.

3. The said Qabul Singh shortly before the death separated from his father's family and went to reside at K. in the district M.

4. The said Qabul Singh died on the 15th of March, 1911. His wife Musammat Gomi and his daughter Musammat Manga survived him. He left no natural born or adopted child or descendant except the said Musammat Manga.

5. At the date of his death the said Qabul Singh was the sole owner of the immovable property specified in schedule A hereto and also of the cash, ornaments and clothes specified in schedule B hereto, and at that time he was carrying on alone a money-lending business.

6. Five or six days before his death the said Qabul Singh directed the said Musammat Gomi to adopt a son to him from among the brotherhood after his death. (a)

7. After the death of the said Qabul Singh the said Musammat Gomi entered into possession of his said property. On the 5th day of June 1912, her name was registered in the Khewat in respect of the property specified in schedule A hereto in the Court of the Assistant Collector, Tehsil A, district M. On the 25th of February, 1913, in the Court of Munsif of M, a succession certificate was issued to the said Musammat Gomi in respect of the debts due to the said Qabul Singh, in connection with his said business as a money-lender

(a) The place where and the time the direction was given should be stated as precisely as possible.

8. By a deed, dated the 28th of March, 1911, and registered on the 30th of March 1911, made between C. G. S., Zamindar of S. K., *etc.*, and the said Ramji Lal, Giri Lal, son of the said Chandan Lal deceased, and the defendant the said C. G. S. acknowledged that he had borrowed the sum of Rs. 39,000 from the afore-said persons in equal proportions of one-third each and hypothecated his property specified therein as security for the payment of the said debt. No part of the said sum had since been repaid by the said C. G. S. and the sum now due under the said deed is Rs. 50,000.

9. One-third of the said money was in fact lent to the said C. G. S. by the said Musammat Gomi and not, as stated in the said deed, by the defendant, and the name of the defendant was put in the said deed as creditor and mortgagee without the knowledge or consent of the said Musammat Gomi.

10. On the 3rd of February, 1915, the said Musammat Gomi in obedience to the directions given to her by the said Qabul Singh as stated in paragraph 6 adopted the plaintiff at a meeting of the brotherhood of the said Qabul Singh at Katuli and performed all the rites necessary for the adoption of the plaintiff and on the same day executed a deed adopting the plaintiff. The said deed of adoption was registered on the 4th of February, 1915 by the said Musammat Gomi in the Registry of the Sub-Registrar of J.

11. On the 10th day of April, 1916, the said Musammat Gomi died.

12. On the 12th day of September, 1916, the defendant claiming to be heir of the said Musammat Gomi procured his name to be entered in the Khewat in the court of Assistant Collector, *etc.*, as the owner of the property specified in schedule A hereto and after

the death of the said Musammat Gomi the defendant took possession of the property specified in schedule B hereto.

(As in paras 4 and 5 of Form No. I.)

14. The plaintiff claims :—

(i) A declaration that the plaintiff is the adopted son of the said Qabul Singh and that the defendant never was adopted by the said Qabul Singh, (ii) that the defendant be ordered to give the plaintiff possession of the property specified in schedules A and B hereto, (iii) Rs. profits of the said property from 12th September 1916 to the date of this suit, (iv) that the deed of 28th of March, 1911, mentioned in paragraph 8 be rectified by substituting the name of the said Musammat Gomi as a creditor instead of the name of the defendant and (v) a declaration that the defendant is entitled to one-third of the money now due under the said deed.

No. 44.—IMPLIED AGREEMENT TO PARTITION.

In or about the *(state date as accurately as possible)* the said *(names of persons then entitled to make a partition)* entered into possession of separate shares of the property set out in the schedule hereto, namely, the said A took the property of Nos. 1 to 4 in the said schedule, the said B took the property Nos. 5, and 6 and one-half of the property No. 7 in the said schedule. The said C took, *etc.* Each of the said shares was subsequently treated as the separate property of the person taking it as stated above, and on the death of the said A on *(date)* and the said C on *(date)* his share was treated as his separate property.

*** ANOTHER FORM**

Since the *(date)* the income of the property set out in the schedule hereto was paid to, and its expenses or

outgoings (such as revenue, etc.) were always paid by the said (names of persons that were entitled to effect a partition) in fixed proportions, namely, one-fourth by the said A, etc., and after the death of the said A on the (date) his share of the said income and expenditure was paid to or by those who would under the rules of Hindu Law be entitled to inherit his separate property, namely (give the names).

(For particulars of other transactions which might also be pleaded as evidence of a partition, see Chapter IX).

No. 45.—MAHOMEDAN LAW, WAQF.

(Title.)

1. The following statement shows the relationship between the parties to this suit. All the parties are descendants of, or are or were married to the descendants of Z. A. K. The said Z. A. K. had five sons and no daughters and left no widow surviving him. Before any of the events to which this suit relates the first son of the said Z. A. K. died leaving no widow or descendants. The second son, Shakur, is now dead. Defendant No. 1 is his widow and defendants Nos. 2 to 8 are his children. The third son of the said Z. A. K. is dead and the plaintiff is and was at the time of the events to which this suit relates his sole representative. The fourth son of the said Z. A. K. Ghafur, is now dead. Defendant No. 9 is his widow. At the time of his death none of his descendants were living. The fifth son of the said Z. A. K. is dead, Latif, deceased, was his eldest son. Defendants Nos. 10 and 11 are widows of the said Latif. Defendant No. 12 is the daughter of the said Latif by defendant No. 11. The 6th son of the said Z. A. K. left one other child, Aziz. The said Aziz

died on July 28th, 1897, and defendant No. 13 is his daughter by defendant No. 10 who was first married to him and after his death married the said Latif.

2. The said Z. A. K. was, and his male descendants are, subject to the Hanafi School of Muhammadan Law.

3. All the defendants except the 13th claim shares in the property of the said Latif. The 13th defendant is made a defendant in the suit on account of the facts stated in paragraph 11.

4. The said Latif was on the 16th of April, 1909, the owner of the property enumerated in Schedules A and B hereto. On the said date the said Latif by a deed of *wagf* registered on the 26th of April 1910, dedicated all his property to God and appointed himself *mutwalli* for life of the said *wagf*.

5. By the said deed of *wagf*, the said Latif conferred upon the said Ghafur the power to appoint *mutwalli* or *mutwallis* of the said *wagf* after the death of the said Latif.

6. From the 16th of April, 1909, till the date of his death the said Latif remained in possession of the said *wagf* property and carried out and fulfilled all the objects and purposes of the said *wagf*.

7. On the 7th of September, 1909, the said Latif died.

8. On the 10th of October, 1909, the said Ghafur in exercise of the power conferred on him by the said deed of *wagf*, appointed the plaintiff and the said Shakur *mutwallis* of the said *wagf* and by an instrument of *tauliat* executed on the same day, the plaintiff accepted the office of *mutwalli*. The said Shakur refused to accept the said office and never accepted it.

9. The plaintiff under the directions of the said Ghafur took possession of the *wagf* property as *mut-walli* and on the 12th of December, 1909, presented an application for mutation of names in the court of

10. The said Shakur opposed the said application and the said Ghafur directed the plaintiff to withdraw his said application in order that the said Ghafur and the plaintiff might negotiate with the said Shakur for a settlement and induce him to withdraw his objection. The plaintiff in obedience to such direction withdrew his said application. (a)

11. Shortly after the execution of the said deed of *wagf* mentioned in paragraph 4, the said Latif executed a lease to the 10th, 11th, 12th and 13th defendants and to the said Shakur of the property numbered 8, etc., in Schedule A hereto. By the said lease a share in the property comprised in it is given to each lessee for his or her life subject to a condition that any lessee who disputes the validity of the said *wagf* shall forfeit his or her interest under the said lease.

The said defendants and the said Shakur have each of them disputed the validity of the said *wagf*.

12. The said Ghafur died in April, 1915, and the said Shakur died on the 1st of August, 1915.

13. On the day of the first, second, third, fourth, fifth, ninth, tenth, eleventh and twelfth defendants procured mutation of names in their favour in the court of in respect of the properties enumerated in Schedules A and B hereto, and Schedule C hereto, shows the profits derived by them from the said properties from that date down to the date of the institution of this suit. The plaintiff

(a) This paragraph contains only "matter of inducement" to show the connection between paragraphs 9 and 13.

does not know how the 6th, 7th and 8th defendants, have dealt with their claims to the said property.⁴

14. In a suit numbered in the court of brought by the second defendant and others as plaintiffs against the plaintiff and others as defendants to recover certain property in the villages of Chakethal and Kakethal, it was decided that the said property was held by the defendant (the plaintiff in this suit) *benami* for the said Latif and the said Shakur in equal shares, but that the suit was barred by section 66 of the Code of Civil Procedure and in the said suit it was also decided that the said *wagf* created by the said Latif was valid and enforceable.

15. The plaintiff has retained for himself the share of the said Shakur of the property in dispute in the said suit. He has not exercised his right to the share of the said Latif in the said property ; but has included it in the property in Schedule A hereto (numbers 22 and 23) and has held and managed it as *wagf* property. If it is decided in this suit that the said *wagf* is invalid, the defendant reserves his rights over the said share of the said Latif.

16. The plaintiff is, lambardar of the villages in which the property enumerated in Schedule B hereto is situated. As such lambardar he collects the profits of the said property and as *mutwalli* he deposits the said profits in the treasury of the said *wagf* and applies it to the objects of the said *wagf*.

(As in paras. 4 and 5 of Form No. 1).

The plaintiff claims :—

- (a) A declaration that the *wagf* mentioned in paragraph 4 is valid.
- (b) Possession as *mutwalli* of the said *wagf* of the property in Schedule A hereto and possession of the property in Schedule B hereto.

if this court decides that he is not already in possession of it.

(c) A declaration that the lease mentioned in paragraph 11 is forfeited and possession of the property comprised in it from the lessees.

(d) Rs. on account of mesne profits as shown in Schedule C hereto.

No. 46.—MUHAMMADAN LAW. DOWER.

(Title).

1. The plaintiff is a widow of I. Y. Khan of J. The first and second defendants are daughters of the plaintiff and of the said I. Y. Khan. The third defendant is another widow of the said I. Y. Khan and the fourth and fifth defendants are the children of her and of the said I. Y. Khan. The second plaintiff is the assignee of half of the subject-matter of this suit.

2. On the 6th of May, 1916, the said I. Y. Khan died intestate at J, leaving the first plaintiff and the defendants his heirs.

3. At the time of his death the said I. Y. Khan was the owner of the properties enumerated in Schedules A and B hereto.

4. In March 1899 at his residence at J, the first plaintiff married the said I. Y. Khan, and it was agreed between her and the said I. Y. Khan before her said marriage that she should have a deferred dower of Rupees one lakh. Except as shown in paragraph 7 no part of the said dower has yet been paid.

5. The first plaintiff and the defendants took possession of the property of the said I. Y. Khan shown in Schedule A hereto; but the fourth defendant took sole possession of the property shown in schedule B

hereto. The latter property is worth Rupees twelve thousand

6. On the 18th of October 1918, the first plaintiff by a deed of sale transferred one-half of her said dower debt to the second plaintiff.

7. The plaintiffs have deducted from the said dower debt Rs 6,250 being 5/80th of one lac. This deduction is made in respect of the first plaintiff's share in the property of the said I. Y. Khan, as one of his heirs under Muhammadan Law,

(As in paragraphs 4 and 5 of Form No. 1).

The plaintiffs claim :—

(1) The sum of Rs. 94,750 or such sum as the Court may find to be due to the first plaintiff as dower with interest at 5 per cent. from the 6th May, 1919 till payment,

(2) As against the fourth defendant, possession of 5/80th of the property shown in the Schedule B hereto or 5/80th of the value thereof as stated in paragraph 4.

No. 47.—PRE-EMPTION.

CLAIM BASED ON CUSTOM.

(Title.)

Plaintiff ... (Pre-emptor)

Defendant ... (Buyer)

1. At the time of the transactions mentioned in paragraph 3 the plaintiff and A. B. (seller) were zamindars and co-sharers in Mahal Village

Pargana and the plaintiff still is a co-sharer and zamindar therein. (If the suit is brought to pre-empt properties in different villages, say : "in the villages and mahals set out in schedule A hereto".) The defendant was then a stranger and had no share in the said

village ; *or state how the plaintiff's right is superior to the defendant's e. g.,* " the plaintiff and the said A. B. were then co-sharers in the mahal mentioned in paragraph 1 and the defendant was then a co-sharer in village mentioned in paragraph 1, but not in the said mahal"). (a).

2. At the time of the said transaction the said A. B. was the owner of a three anna share in the said mahal, (or, at the time of the said transaction the said A. B. was the owner of the properties specified in schedule B hereto.)

3. On or about (*give exact date if possible*) the said A. B. contracted to sell to the defendant and by a sale-deed, dated _____ and registered on (*date*) at _____ sold and transferred to the defendants his said share in the said mahal (*or "the properties set out in Schedule B hereto"; or "the properties numbered 1, 10 and 15 in the schedule hereto"*).

The consideration stated in the said deed is Rs. (b)

4. A right of pre-emption as between co-sharers in the said mahal existed at the time mentioned in paragraph 2, and still exists, and is thus stated in the *wajib-ul-arz* prepared at the settlement of _____ (*set out the entry in the wajib-ul-arz.*)

or

The existence of a right of pre-emption in the said mahal was recognised by a final decree passed on (*date*) in suit No. _____ in the Court of _____ (c)

(a) See the *Agra Pre-emption Act* (No. XI of 1922), s. 12

(b) (If the amount of the price is not disputed, say, "for Rs. _____"; but this would be an admission that the price was not fictitious, see para. 5 below.)

(c) See the *Agra Pre-emption Act* (No. XI of 1922), s. 5.

5. The price stated in the sale-deed mentioned in paragraph 3 is overstated in order to defeat claims to pre-empt the lands transferred thereby. The price actually paid was Rs. (or, if the plaintiff does not know the price actually paid, say "The plaintiff will contend that the price paid was the value of the said lands which is Rs. and no more.") (a)

6. The plaintiff first heard of the transaction mentioned in paragraph 3 on or about (date) and immediately offered to pay the said price (or, the value of the land as stated in paragraph 5) to the defendant and demanded possession from the defendant, which the defendant refused and still refuses to give to the plaintiff.

7. The plaintiff is ready to pay such sum as the Court finds to be the price actually paid by the defendant to the said A. B. for the land transferred by the said sale-deed. (b)

NO. 48 — CLAIM BASED ON MUHAMMADAN LAW.

1. *Allege that plaintiff and the seller are both Muhammadans.*

2. *Plead the contract to sell and the sale by A. B. (the seller) to the defendant as in paragraph 3 of the preceding precedent and describe the property sold.*

3. At the date of the transactions mentioned in paragraph 1. the plaintiff was and still is a co-sharer in the lands described in paragraph 1 (*shafi-i-sharik*) or the owner of (*describe land*) across which the said A. B. had an easement of bringing water along a watercourse to irrigate the lands described in paragraph 1 (*shafi-i-*

(a) This averment is unnecessary if the plaintiff does not dispute the amount of the price.

(b) This averment is unnecessary if the plaintiff does not dispute the amount of the price.

khalleet) or the owner of (*describe land*) bordering^o on the lands described in paragraph 1 (*shaft-i-jar*).

4. Immediately on hearing of the sale mentioned in paragraph 1 the necessary talabs were performed by the plaintiff.

Remaining paragraphs as in the preceding precedent.

PETITIONS IN MATRIMONIAL CASES. (a)

No. 1.—PETITION BY HUSBAND FOR A DISSOLUTION OF MARRIAGE WITH DAMAGE AGAINST A CO-RESPONDENT, BY REASON OF ADULTERY.

(*See sections 10 and 34 of the Indian Divorce Act*).

Between A. B., petitioner and C. B., respondent, and X. Y., co-respondent.

In the (High) Court of

To the Hon'ble Mr. Justice (or, To the Judge of).

The day of 1925.

The petition of A. B., of

SHEWETH,

1. That your petitioner was on the day of
one thousand nine hundred and , lawfully
married to C. B., then C. D., spinster, at

(a) We have selected, for the assistance of the pleader, some of the few precedents contained in the Schedule of Forms to the Indian Divorce Act, (Act IV of 1869). These are statutory. Why they are seldom or never used in the districts courts it is impossible to suggest, unless it be that pleaders do not know of their existence. We have added to them, with certain modifications, further examples from Dixon's "Divorce Law and Practice in England," which a practitioner should never fail to consult if he can procure a copy. A genuine attempt to follow these examples will avoid all risk of serious error.

2. ^o That after (or, from the date of) the said marriage, your petitioner lived and cohabited with his said wife at _____ and at _____, in _____, and lastly at _____, in _____, and that your petitioner and his said wife have had issue of their said marriage, five children, of whom two sons (a) only survive, aged respectively twelve and fourteen years.

3. That during the three years immediately preceding the day of _____ one thousand nine hundred _____ and _____, X. Y., was constantly, with few exceptions, residing in the house of your petitioner at _____ afore-said, and that on divers occasions during the said period, the dates of which are unknown to your petitioner, the said C. B. in your petitioner's said house committed adultery with the said X. Y.

4. That at the time of their said marriage, your petitioner and the said C. B. were and still are Christians (or and your petitioner, still is a Christian).

5. (a) That your petitioner was born in British India and has always lived there and now resides at _____ in the district of _____

o

or

That your petitioner came to British India in the year _____, and settled there with the intention of making it his permanent home, and now, etc.

or

That your petitioner's domicile (b) is in England.

6. That no collusion or connivance exists between your petitioner and his said wife for the purpose of

(a) The names should be stated.

(b) For the rules concerning domicile see the note at the end of this book.

obtaining a dissolution of their marriage or for any other purpose.

Your petitioner, therefore, prays, etc. (See page 204).
(signed) A. B.

FORM OF VERIFICATION

I, A. B., the petitioner named in the above petition, do declare that what is stated therein is true to the best of my information and belief.

No. 2.—PETITION BY WIFE FOR DISSOLUTION OF MARRIAGE.

(See section 10 of the Indian Divorce Act).

Between A. B., petitioner, and C. B. respondent,
rest of Heading as the No. 1).

The petition of A. B., of
SHEWETH,

1. That your petitioner was on the day of 19 , lawfully married to C. B. (*state whether the wife was then a widow or a spinster*) at (*Here state where the marriage took place*).

2. That after the said marriage your petitioner lived and cohabited with her said husband at and that your petitioner and her said husband have had as issue of their said marriage *two* children ; namely (*Here state the names and ages of the children (if any) of the marriage*).

3. That on the day of , 19 , and on other days between that day and (a) the said C. B., at , in the district of , committed adultery with R. S :

(a) Here state the date of the latest act of adultery alleged.

4. That in and during the months of, January, February and March, 19 , the said R. S., frequently visited the said C. D. at , and on divers of such occasions committed adultery with the said C. D.

5. [*Here allege such other acts on the part of the husband, such as cruelty or desertion, as will, when coupled with adultery, entitle a wife to a divorce.*] (a).

6. (*As in paragraph 4 of Petition No. 1*).

7. (*Allege the petitioner's husband's domicile and that he resides within the jurisdiction of the Court as the paragraph 5 of Petition No. 1*). (b)

8. [*As in paragraph 6 of the preceding form.*]

Your petitioner therefore humbly prays.

That your lordship will be pleased to decree:—

(*Here set out the relief sought*).

And that your petitioner may have such further and other relief in the premises as to your lordship may seem meet.

(*Petitioner's signature.*),

Form of Verification, See No. 1. ,

NO. 3.—PETITION FOR DECREE OF NULLITY OF MARRIAGE.

(*See section 18 of the Indian Divorce Act.*)

(*Heading as in No. 2.*)

The petition of A. B., falsely called A. D.,
SHEWETH

1. That on the day of , one thousand nine hundred and , your petitioner, then a spinster

(a) See p. 240, *et seq.*

(b) The domicile of a wife is that of her husband.

eighteen years of age, was married in fact, though not in law, to C. D., then a bachelor of about thirty years of age, at .

2. That from the said day of , one thousand nine hundred and , until the month of , one thousand nine hundred and , your petitioner lived and co-habited with the said C. D., at divers places, and particularly at aforesaid.

3. That the said C. D., has never consummated the said pretended marriage.

4. That at the time of the celebration of your petitioner's said pretended marriage, the said C. D. was, by reason of his impotency or malformation, legally incompetent to enter into the contract of marriage.

5. (*As in paragraph 4, p. 196.*)

6. (*State respondent's residence.*)

7. That there is no collusion or connivance between your petitioner and the said C. D. with respect to the subject of this suit. Your petitioner therefore prays that this (Hon'ble) Court will declare that the said marriage is null and void.

(Signed) A. B.

Form of Verification : See No. 1.

The above is the form given in the schedule to the Indian Divorce Act. In an English petition, which, in this respect, seems more suitable, paragraphs 2, 3 and 4 and the prayer would run thus :—

2. That your petitioner and the respondent have from that time until shortly before the commencement of this suit, and for more than three years, namely, for years, lived and cohabited together.

3. That the said was at the time of the said marriage, and has ever since been, wholly unable to

• consummate the said marriage, by reason of the malformation (*or*, the frigidity and impotence) of his parts of generation.

4. That the said malformation (*or*, frigidity and impotence) of the said is wholly incurable by art or skill.

Your petitioner therefore humbly prays—

That your lordship will be pleased to decree that the ceremony of marriage celebrated as aforesaid between your petitioner and the said is null and void, and that your petitioner is free from all bond of marriage with the said ; and that your petitioner may have such further and other relief in the premises as to your lordship may seem meet.

**No. 4.—PETITION BY WIFE FOR JUDICIAL
SEPARATION ON THE GROUND OF HER
HUSBAND'S ADULTERY.**

(See section 22 of the Indian Divorce Act).

(Heading as in No. 2.)

The petition of C. B., of , the wife of A. B.
SHEWETH

1. That on the day of , one thousand nine hundred and , your petitioner, then C. D., was lawfully married to A. B. at the Church of in the .

2. That after her said marriage, your petitioner cohabited with the said A. B. at and at , and that your petitioner and her said husband have issue living of their said marriage, three children, namely, *etc.*

3. That on divers occasions in or about the months of August, September, and October, one Thou-

said nine hundred and , the said A. B., at aforesaid committed adultery with E. F., who was then living in the service of the said A. B. and your petitioner at their said residence at aforesaid.

4. That on divers occasions in the months of October, November and December, one thousand nine hundred and , the said A. B., at aforesaid, committed adultery with G. F., who was then living in the service of the said A. B. and your petitioner at their said residence at aforesaid.

5. (*As in paragraph 4, p. 196.*)

6. (*State respondent's residence.*)

7. That no collusion or connivance exists between your petitioner and the said A. B. with respect to the subject of the present suit

Your petitioner therefore prays that this (Hon'ble) Court will decree a judicial separation to your petitioner from her said husband by reason of his aforesaid adultery.

(Signed) C. B.

(*Form of Verification : See No. 1.*)

**No. 5.—PETITION FOR A JUDICIAL SEPARATION
BY REASON OF CRUELTY.**

(*See section 22 of the Indian Divorce Act.*)

(*Heading as in No. 2.*)

The petition of A. B. (Wife of C. B.) of
SHEWETH,

1. That on the day of , one thousand nine hundred and , your petitioner, then A. D., spinster, was lawfully married to C B, at .

2. That from her said marriage, your petitioner lived and cohabited with her said husband at until the day of , one thousand nine hundred and , when your petitioner separated from her said husband as hereinafter more particularly mentioned and that your petitioner and her said husband have had no issue of their said marriage, (or state number, names and ages of children.

3. That from and shortly after your petitioner's said marriage, the said C. B. habitually conducted himself towards your petitioner with great harshness and cruelty, frequently abusing her in the coarsest and most insulting language, and beating her with his fists, with a cane, or a whip or with some similar weapon.

4. That one evening in or about the month of one thousand nine hundred and , the said C. B. in the highway and opposite to the house in which your petitioner and the said C. B. were then residing at aforesaid, endeavoured to knock your petitioner down, and was only prevented from doing so by the interference of F. D., your petitioner's brother.

5. That subsequently on the same evening, the said C. B. in his said house at aforesaid, struck your petitioner with his clenched fist a violent blow on her face

6. That on one Friday night in the month of one thousand nine hundred and , the said C. B. in , without provocation, threw a knife at your petitioner, thereby inflicting a severe wound on her right hand.

7. That on the afternoon of the day of , one thousand nine hundred and , your petitioner, by reason of the great and continued cruelty practised towards her by her said husband, withdrew

with assistance from the house of her said husband to the house of her father at , that from and after the said day of , one thousand nine hundred and , your petitioner has lived separate and apart from her said husband, and has never returned to his house or to cohabitation with him

8. (*As in paragraph 4, p. 196.*)

9. (*State respondent's residence.*)

10. That there is no collusion or connivance between your petitioner and her said husband with respect to the subject of the present suit.

Your petitioner, therefore, prays that this (Hon'ble) Court will decree a judicial separation between your petitioner and the said C. B. and also order that the said C. B. do pay the costs of and incident to these proceedings.

(Signed) A. B.

Form of Verification : See No. 1.

No. 6.—ALLEGATIONS OF OTHER GROUNDS FOR DIVORCE OR SEPARATION.

Desertion.—That on or about the day of 19 , the said C. D. deserted your petitioner without reasonable excuse, and from that time down to the present, being for the space of two years and upwards, has continued to desert your petitioner.

Cruelty.—That in or about the month of , 19 at No. , Street aforesaid, the said C. D. struck your petitioner in her face with his clenched fist and knocked her down.

That on the day of in the said year, at their residence as aforesaid, the said C. D. violently

assaulted your petitioner and dragged her out of bed by the hair of her head, and kicked her, and threatened to kill her.

Habit.—That in and during the years 19 and 19 at their residence as aforesaid, the said C. D. has habitually used abusive, offensive, and threatening language to your petitioner and beaten her.

Fear of bodily injury.—That in consequence of the above treatment your petitioner was in daily fear of her life or of some serious bodily injury.

Withdrawal from cohabitation.—That under the circumstances aforesaid your petitioner was on the day of compelled to withdraw from cohabitation with the said C. D. for her own safety : that the respondent, by a solemn promise that he would treat her kindly for the future. induced her to return to cohabitation : that upon your petitioner doing so, he again treated her with violence and cruelty, and that in consequence of his said conduct your petitioner was again compelled to withdraw from cohabitation with the said respondent, and has lived separate from him since her said withdrawal to the present time.

Charge of assault before a magistrate.—That by reason of the said C. D.'s violence your petitioner was compelled to seek the protection of the law, and that accordingly, on the day of last, the said C. D. was taken before the magistrate presiding at , and was by him bound over to keep the peace towards your petitioner for a space of months

Incestuous adultery.—That on or about the day of , and on other days between that day

and , the said C. D. at , in the district of , committed incestuous adultery with M. N., a niece of your petitioner. .

Rape.—That on the day of , in the year 19 , at , in the district of , the said C. D. committed a rape upon the person of

Bigamy with adultery.—That on the day of 19 , at , in the district of , the ceremony of marriage was duly performed between the said respondent and one E. F., your petitioner, his lawful wife, being then alive, whereby the said respondent committed bigamy, and that from and after the above date, particularly on or about the day of , the said respondent and the said E. F., cohabited and adultery together.

No. 7.—CLAIM FOR DAMAGES.

That your petitioner claims from the said M. N. as damages in respect of such adultery the sum of Rs. 15,000.

No. 8.—PRAYER.

Your petitioner therefore humbly prays that your lordship will be pleased to decree:—

Divorce.—That the said marriage of your petitioner with the said C. D. may be dissolved.

Judicial separation.—That your petitioner may be judicially separated from the said C. D.

Where there is a correspondent, whether damages are claimed or not.—That the said co-respondent may be condemned in the costs of these proceedings.

Applicable in either case.—That your petitioner may have the custody of the child (or, children), of the said marriage(a) and that your petitioner may have such further and other relief in the premises as to your lordship may seem meet.

Prayer where damages are claimed.—That the said be condemned in such damages as may be awarded in respect of the said adultery; that the said damages be applied for the benefit of your petitioner and of the said children, respectively, of the said marriage, or otherwise as to your lordship may seem meet.

**No. 9—PETITION FOR ALIMONY PENDING
THE SUIT,**

(See section 36 of the Indian Divorce Act.)

(Heading as in No. 1 or 2 as the case may be.)

The petition of C. B. the lawful
wife of A. B.

SHEWETH,

1. That the said A. B. has for some years carried on the business of , at , and from such business derives the net annual income of from Rs. 4,000 to 5,000.

2. That the said A. B. is possessed of plate, furniture, linen and other effects at his said house at aforesaid, all of which he acquired in right of your petitioner as his wife, or purchased with money he acquired through her, of the value of Rs. 10,000.

3. That the said A. B. is entitled, under the will of his father, subject to the life-interest of his mother,

(a) Here give the names of the children of whom the petitioner desires the custody.

therein, to property of the value of Rs. 5,000 or 'some other considerable amount.

Your petitioner, therefore, prays that this (Hon'ble) Court will decree such sum or sums of money by way of alimony, pending the suit as to this (Hon'ble) Court may seem meet.

(Signed) J. B.

No. 10.—PETITION FOR RESTITUTION OF CONJUGAL RIGHTS.

(See section 32 of Indian Divorce Act.)

(Heading as in No. 2.)

The petition of A. B., of
SHEWETH,

1. That your petitioner was on the day of
 , 19 , lawfully married to C. B. at
2. That after her said marriage your petitioner lived and cohabited with her said husband at , afore-said, and that there has been no issue of the said marriage.
3. That the said did on the day of , 19 , withdraw from cohabitation with your petitioner, and has ever since, without any just cause, kept and continued away from her, and has also refused, and still refuses, to render her conjugal rights.
Your petitioner therefore humbly prays.

That your lordship will be pleased to decree that the said do take home and receive your petitioner as his wife, and render to her conjugal rights; and that he pay the costs of said incident to this petition; and that your petitioner may have such further and other

relief in the premises as to your lordship may seem meet.

(Signature of petitioner).

WRITTEN STATEMENT OF DEFENCE.

No. 1.—GENERAL DEFENCES.

(a) Traverse.

The defendant denies (or, does not admit) that (*state the facts denied or not admitted*).

(b) Confession and avoidance.

The defendant admits that (*state the facts admitted*) but says that (*state the additional facts on which the defendant relies as absolving him from liability*).

(c) Limitation.

The plaintiff's alleged cause of action is barred by article—of the second Schedule of the Indian Limitation Act, 1908.

(d) Plea to the Jurisdiction.

The court has no jurisdiction to try this suit because (*state the facts on which the defendant relies as ousting the jurisdiction of the court*).

(e) Insolvency.

On the day 1925 by an order made in the Court of the defendant was adjudged an insolvent. (Or)

On the day of 1925 and after the plaintiff's cause of action had accrued, which cause of action was a claim provable in insolvency, the defendant was adjudged an insolvent by an order made in the Court of and by another order of the said Court made on the day of 1925 the defendant obtained his discharge whereby he was released from the plaintiff's said claim.

(f) Payment into Court.

The defendant as to the whole of the Plaintiff's claim (or, as to Rs. part of the money claimed) has paid into Court the sum of Rs and says that that sum is enough to satisfy the plaintiff's claim (or, as much of the plaintiff's claim as is not hereby admitted.)

(g) *Res-judicata*.

The plaintiff's claim is barred by the decree in suit No. in the court of b-tween (*state the parties*).

(h) New matter of defence arising after the institution of the suit.

Since the institution of this suit, namely on the day of 1925 *state the facts relied on*).

(i) Accord and satisfaction.

On (*date*) it was agreed verbally (or, in writing) that the plaintiff would accept Rs. (or, would accept 50 mds. of Dehra Dun rice) from the defendant in discharge of the claim in respect of which the plaintiff sues in this suit, and the said sum was paid (or, the said rice was delivered) by the defendant to the plaintiff and accepted by him on (*date*).

(j) Set-off.

The defendant is entitled to set-off Rs. [or, to a set-off equal to the plaintiff's claim ; or, to a set-off equal to as much of the plaintiff's claim as is not hereby admitted] for (*here state the grounds of the set-off, e.g., for goods sold and delivered by the defendant to the plaintiff*).

Particulars are as follows :—

	Rs.	a.	p.
January 25, 1925, 20 maunds of rice at Rs.			
per maund
March 19, 1925, 35 maunds of barley at			
Rs. , per maund
Total

(k) Estoppel by words.

On the . . . day of . . . 19 . . . (or, before the defendant bought the lands over which the plaintiff now claims a right of way) the plaintiff, (knowing that the defendant was intending to buy the said lands) told the defendant verbally at (or, in a letter dated etc.) that (the plaintiff was not entitled to a right of way over the said lands.) The plaintiff thereby induced the defendant to pay Rs. . . . more for the said land than he would have done if he had known that the plaintiff claimed a right of way over it; (or to buy the said land which, etc.), and the defendant will contend that by reason of the said facts the plaintiff is estopped from (claiming a right of way over the said lands).

(l) Estoppel by conduct.

1. By a power of attorney dated, etc., the said (mortgagor) appointed the plaintiff *am-mukhtar* for her.

2. The plaintiff executed the said mortgage-deed for and in the name of the said (mortgagor) as her *mukhtar* under the said power of attorney; and in that capacity he registered the said deed and received the mortgage money on (date).

3. The plaintiff at the time when he executed the said mortgage-deed was aware of its contents, and by his acts and conduct as stated in paragraph 2 he represented to the defendant that he had no claim or title to the lands affected by the said mortgage (or, "that he had abandoned any claim that he might have to the said lands") and thereby induced the defendant to lend Rs. upon the security of the said lands and the defendant will contend that by reason of these facts the plaintiff is

1 See also Defente No. 31.

estopped from disputing the validity of the said mortgage.¹

No. 2.—PERFORMANCE REMITTED.

On (*date*) the plaintiff verbally (*or*, in a letter to the defendant dated) informed the defendant that the plaintiff would not require performance of the contract alleged in the plaint.²

No. 3.—RESCISSION OF CONTRACT,

On (*date*) the plaintiff and defendant verbally (*or* by a letter dated to the defendant, the plaintiff offered and by a letter dated the defendant) agreed to rescind the contract alleged in the plaint.

No. 4.—MINORITY.

The defendant was born on (*date*) and was a minor at the time of the events alleged in paragraph of the plaint (*or*, at the time when the contract alleged in paragraph of the plaint was made ; *or*, when the document mentioned in paragraph of the plaint was executed).

No. 5.—FRAUD.

On (*date*) the plaintiff represented to the defendant verbally (*or*, in a letter to the defendant ; *or state how the representation was made*) that (*set out the representation*) but in fact as the plaintiff then knew (*state shortly the matter in*

¹ See *Sarat Chunder v. Gopal Chunder*, L. R. 19 Ind. App., 203.

² See the Indian Contract Act, S. 63

which the statement was false), and the plaintiff thereby induced the defendant to enter into the contract alleged in paragraph of the plaint.

Another form.

The defendant was induced to enter into the alleged contract (*or, to buy the said goods*) by the fraud of the plaintiff.

Particulars are as follows :—

On (*date*) the plaintiff verbally (*or in a letter to the defendant dated*) represented to the defendant that (*set out the representation*) but as the plaintiff then knew (*set out the true facts*).¹

No. 6.—MISTAKE.

The defendant executed the (*document*) mentioned in paragraph of the plaint in the belief that it was (*state what the defendant thought it was*) and without being aware of its contents.

Another form.

The (*document*) mentioned in paragraph of the plaint was prepared by the plaintiff's vakil who was employed to draw up the (*document*) necessary to carry out the contract stated in paragraph . The said contract was the only one made between the plaintiff and the defendant and the said (*document*) was signed by the defendant in the belief that it carried out the said .

¹ See also plaints Nos. 16, 18 and 19.

By omitting the words, "as the plaintiff then knew," and by substituting the word "misrepresentation" for "fraud," these forms can, in a proper case, be used for the much safer defence of misrepresentation.

contract. The said (*document*) does not carry out the said contract, in the following respects (*state them*).

No. 7.—UNDUE INFLUENCE.

At the time when the said (*mortgage*) was executed, the plaintiff was the *mukhtar* of the defendant and the defendant had no proper independent advice at the time when he executed the said (*mortgage*).

Another form.

At the time when the said (*document*) was executed by the said X, the plaintiff was in a position to dominate and did dominate the will of the said X and thereby induced him to execute the said (*document*).

Particulars of the facts relied on as evidence of undue influence.

At the time when he executed the said document the said A was dying of (*state nature of the illness*) and the plaintiff prevented any of his relations from visiting the said A and on (*date*) the plaintiff was heard to tell the said A that he would not allow any of the relatives of the said A to visit him unless he executed the said (*document*.)

**No. 8.—DEFENCE THAT A CONTRACT WAS
MADE AS A WAGER.**

The agreement alleged in paragraph of the
plaint was made as a wager on the price of (*grain*) on
(*date*). No actual sale and delivery of (*grain*) was intended
(*or, contemplated*) as the plaintiff knew when he
entered into the said alleged contract.

No. 9.—CONDITION PRECEDENT.

The defendant admits that he agreed to take the bungalow mentioned in the plaint from the plaintiff, at the rent mentioned therein, but says that it was agreed between the plaintiff and the defendant at the time when the contract of tenancy for the said bungalow was made between them, that the defendant would not be bound to take the said bungalow unless he were transferred from Lucknow to Allahabad on or before the 1st of October, 1920. The defendant was not transferred to Allahabad on or before the said date and as soon as he knew that he would not be so transferred he informed the plaintiff in a letter dated.

Another form.

It was agreed between the plaintiff and the defendant that the defendant would become tenant of the bungalow mentioned in the plaint to the plaintiff from (date) provided that the said bungalow was put in repair and white-washed before (date). The defendant did not white-wash the said bungalow before the said date and the said bungalow was not in proper repair on the said date in the following respects :—The roof was leaking, two of the doors were broken and had not been replaced, and the tiling of the floor in one of the rooms had been taken up and had not been relaid.

No. 10.—DEFENCES TO AVERMENTS OF FRAUD.

The plaintiff did not believe that the statement set forth in paragraph of the plaint was true

or

At the time mentioned in paragraphs of the plaint the plaintiff was aware of the true facts about the matters mentioned in the said paragraphs.

**No. 14.—DEFENCE TO PLAINT No. 12 WITH
FULL TRAVERSES.**

“ 1. The defendants admit that the plaintiffs carry on a *pakki arhat* agency at Amroha, and that the plaintiffs have on occasions acted as *pakka arhatias* for defendants since 1910 ; but they deny that the plaintiffs ever acted as *pakka arhatias* for the defendants before that date, or that there has been any regular course of business between the defendants and the plaintiffs such as that alleged in paragraph 1 of the plaint.

2. The defendants deny that it is difficult to sell bajra in Amroha unless it is of the kind and quality grown in the district of Amroha (hereinafter called Amroha bajra). There has never been any course of business between the plaintiffs and the defendants such as that alleged in paragraph 2 of the plaint.

3. The facts stated in paragraphs 3 and 4 of the plaint are admitted.

4. The defendants do not admit either that any of the contracts stated in paragraph 5 of the plaint were made, or that the said contracts or any of them, if made (which the defendants do not admit) related to Amroha bajra.

5. Subject to the plea in paragraph 13 hereof, the defendants admit that if the contracts mentioned in paragraph 5 of the plaint were made, which the defendants deny, the plaintiffs would be liable as stated in paragraph 6 of the plaint.

6. The defendants admit that they received telegrams and letters from the plaintiffs as alleged in paragraph 7 of the plaint, and that they replied to them. The said telegrams and letters only stated the quantity of bajra sold and the dates on which delivery was to be made ; but none of them stated that Amroha bajra had

been sold on the defendants' account, nor did the defendants in any of their replies agree to sell or deliver Amroha bajra.

7. In reply to paragraph 8 of the plaint, the defendants repeat paragraphs 4 and 6 hereof, and admit that they instructed the plaintiffs to take delivery of bajra from J. K. J. N. as alleged in paragraph 8 of the plaint.

8. The defendants deny that the bajra mentioned in paragraphs 9 and 10 of the plaint was not Amroha bajra ; and, alternatively, they say that the said bajra was as good as that ordinarily sold in Amroha and was easily saleable there, and they deny that any buyer refused to accept the said bajra either because it was not Amroha bajra or at all.

9. The defendants deny each and every fact stated in paragraph 10 of the plaint.

10. The defendants do not admit that the price of Amroha bajra was 10 seers 5 chattaks in Amroha market on the 16th of December ; nor do they admit that the plaintiffs made any payment to the said buyers as alleged in paragraph 11 of the plaint.

11. The defendants do not admit that any custom such as that alleged in paragraph 12 of the plaint exists in Amroha. The rate of commission is Rupee one per cent., which covers all the *pakka arhatu's* charges. The payment of one anna six pies for charity is not invariably made, and is entirely voluntary on the part of the seller (or, depends entirely upon the wish of the seller).

12. The defendants do not admit that the plaintiffs made any payment of the kind alleged in paragraph 13 of the plaint.

13. As an alternative defence to the plaintiffs' claim the defendants say that (*as in form No. 1, p 211.*)

**No. 15.—DEFENCE TO A CLAIM FOR DAMAGES FOR
NEGLIGENT DRIVING.**

"1. The defendant denies that the motor car mentioned in paragraph 2 of the plaint was his property or was being driven by his servant, or by any one acting under his orders or control. The said motor car then belonged to M. N. & Co. of taxi-cab proprietors, and was being driven by their servant, and had been hired by the defendant to drive him from to .

2. The defendant does not admit that he or the driver of the said motor car was guilty of negligence on the occasion mentioned in paragraph 2 of the plaint.

3. Even if the defendant or the said driver was negligent, which the defendant denies, there was contributory negligence on the part of the plaintiff.

PARTICULARS :

Immediately before the events mentioned in paragraph 2 of the plaint, the plaintiff proceeded to cross the road without looking to see what traffic was coming up the road, and when the defendant's motor was about 3 yards from him, and coming up behind him, the plaintiff dropped a book and stopped it to pick it up.

4. The defendant does not admit any of the facts alleged in paragraph 3 of the plaint.¹

**No. 16.—DEFENCES IN SUITS FOR MALICIOUS
PROSECUTION.**

1. The defendant does not admit that he had no reasonable and probable cause for instituting the

1. See No. 26 of the precedents for the plaint. The first sentence of paragraph 1 of this defence as given in Appendix A of the Civil Procedure Code makes the mistake of the "literal traverse."

proceedings mentioned in the plaint against the plaintiff, or that he was actuated by malice when he instituted the said proceedings. On the contrary the defendant believed in good faith that he was discharging a public duty by instituting the said proceedings.

(2) The defendant does not admit that the said charge against the plaintiff was dismissed (or, that the plaintiff was acquitted on the said charge).

**No. 17.—DEFENCE TO A SUIT FOR FALSE
IMPRISONMENT.**

On (*date*) certain property of the defendant (*describe it*) was stolen from him, and the defendant had reasonable and probable cause for suspicion that the said property had been stolen by the plaintiff, and in that belief gave the plaintiff into the custody of the police on (*date*) and charged him with having taken the said goods.

Particulars of the defendant's grounds of suspicion are :—On (*date*) the defendant placed the said goods in a godown in the presence of the plaintiff, and locked the said godown and gave the key to the plaintiff. On the following morning the plaintiff was absent from his work, and could not be found and on the next day the defendant broke open the said godown and found that the said property was not there.

No. 18.—DEFENCE TO PLAINT No. 28.

On the occasion mentioned in paragraph of the plaint the plaintiff was drunk, (*or state the acts or conduct which would justify an arrest without warrant under S. 131 or 132 of the Indian Railways Act, 1890*), and the defendants removed the plaintiff from the carriage

mentioned in the plaint as gently as possible (or without using more force than was necessary), and detained him till he could be brought before a magistrate, (or till he gave bail) which was the assault and imprisonment complained of. Except as stated herein, the defendants deny that they either assaulted or imprisoned the plaintiff.

No. 19.—DEFENCE IN SUITS FOR DETENTION OF GOODS.

1. The goods were not the property of the plaintiff.
2. The goods were detained for a lien to which the defendant was entitled.

Particulars are as follows :—

1907, May 3rd. To carriage of the said goods from Delhi to Calcutta :—

45 maunds at Rs. 2 per maund ...Rs. 90

No. 20.—DEFENCE TO PLAINT No. 31.

The defendant denies that when A bought the cotton cloth mentioned in the plaint he was acting as agent for X & Co., or for any other person. The said A bought the said goods from the plaintiff on his own behalf, and the plaintiffs were aware of this when they sold and delivered the said cotton cloth to him.

No. 21.—STOPPAGE IN TRANSIT.

While the goods mentioned in paragraph of the plaint were in transit to the plaintiff by the Rail-way Company, and before they had been delivered to the plaintiff, the plaintiff became insolvent; and the

defendant thereupon stopped the said goods while so in transit to the plaintiff.

No. 22.—LIEN.

The motor car claimed by the plaintiff is detained by the defendant in consequence of a lien which the defendant has on the same.

PARTICULARS.

The plaintiff left the said motor car with the defendant on (date) for repairs. The defendant executed all the said repairs and the defendant's charges for the said repairs amounted to Rs Full particulars of the said charges were given to the plaintiff in a bill dated which bill, the plaintiff, by letter dated (or verbally on), refused to pay. Whereupon the defendant refused to deliver the said motor-car till the said bill was paid. The amount of the said bill is still due by the plaintiff to the defendant.

No. 23.—DEFENCES IN SUITS FOR DEFAMATION. (a)

The defendant neither wrote (or, spoke) nor published the words alleged in paragraph of the plaint. The said words, if they were written (or, spoken) and published by the defendant, which the defendant denies, did not refer to the plaintiff. The said words did not bear, and were not understood to bear, the defamatory meaning alleged in the plaint, or any other defamatory meaning.

The said words were written (or, spoken), if at all, in jest, and were so understood by (the person to whom the letter was sent) (or, those who heard them).

The said words were spoken, if at all, by the defendant in anger, and were mere abuse. They were not meant, and were not understood by the persons who heard them, to have the meaning alleged in the plaint, or any other defamatory meaning.

The said words in their ordinary meaning, and without the meaning alleged in paragraph of the plaint, were true in substance and in fact

or

The said words were true in substance and in fact.

PARTICULARS.

On the (*date*) in the Court of *etc.*, the plaintiff was declared an insolvent and obtained his discharge by an order of the said Court dated . On (*date*) in the said Court the plaintiff was again declared, *etc.*

The said words were written (*or*, spoken) and published by the defendant on a privileged occasion, and in such a manner as to make them a privileged communication.

PARTICULARS.

At the time when he wrote the said words, the defendant was in the service of the.....Bank as (*state capacity*). On (*date*) A. B., the manager of the said bank, wrote to the defendant, stating that the plaintiff had applied to the said bank for a large loan (*or*, for a loan of Rs.), and asking for the defendant's advice about making the loan. The defendant, in discharge of his duty as a servant of the said bank, wrote the words alleged in the plaint, believing them to be true, and without any malice against the plaintiff.

**No. 24.—DEFENCES IN SUITS RELATING TO
NUISANCES.**

1. The plaintiff's lights are not ancient (*or deny his other alleged prescriptive right*).

2. The plaintiff's lights will not be materially interfered with by the defendant's buildings.

3. The defendant denies that he or his servants pollute the water mentioned in paragraph of the plaint.

(If the defendant claims a right by prescription, or otherwise, to do what is complained of, he must say so, and must state the grounds of his claim, i.e., whether prescription, grant or what.)

4. The plaintiff acquiesced in the acts mentioned in paragraph of the plaint. , , .

Particulars of the facts relied on as evidence of acquiescence are :—(*state them*).

5. As to the plaintiff's claim for damages, the defendant will rely on the above grounds of defence, and says that the acts complained of have not produced any damage to the plaintiff. (*If other grounds are relied on, they must be stated, e.g., limitation as to past damage*).

No. 25.—DEFENCES TO A SUIT FOR FORECLOSURE.¹

The defendant did not execute the alleged mortgage-deed.

2. The mortgage was not transferred to the plaintiff (*if more than one transfer is alleged, say which is denied*.)

3. The suit is barred by article of the second schedule to the Indian Limitation Act, 1877.

¹ The equitable doctrine of *laches*, upon which paragraph 4 of Form No. 10 of the defences in Appendix A of the Civil Procedure Code founded, has a very limited scope in India, see the Specific Relief Act, S. 56 (h) .

4. The following payments have been made,
viz. :—

	Rs.
(Insert date.)— — —, ...	1,000
(Insert date.)— — —, ...	500

5. The plaintiff took possession on the _____ of _____ and has received the rents ever since.

6. The plaintiff released the said debt on (state date and how the release was given).

7. The defendant transferred all his interest in the said mortgage to *A. B.*, by a deed of transfer, dated _____

No. 26.—DEFENCES TO A SUIT FOR REDEMPTION.

1. The plaintiff's right to redeem is barred by article _____ of the first schedule to the Indian Limitation Act, 1908.

2. By an instrument of transfer dated _____ the plaintiff transferred all his interest in the property to *A. B.*

3. The defendant by an instrument of transfer dated the _____ day of _____, transferred all his interest in the mortgage-debt and property comprised in the mortgage to *A. B.*

4. The defendant never took possession of the mortgaged property, or received the rents thereof.

(If the defendant admits possession for a time only, he should state the time, and deny possession beyond the time stated.)

No. 27.—DEFENCE OF PLENE ADMINISTRAVIT.¹

1. *A. B.*, the testator mentioned in the plaint died insolvent ; he was entitled at his death to some

¹ i. e., That the defendant has distributed all the assets in due course of administration.

immovable property which the defendant sold and which produced the net sum of Rs. , and the testator had some movable property which the defendant got in, and which produced the net sum of Rs.

2. The defendant applied the whole of the said sums, and the sum of Rs. which the defendant received from rents of the said immovable property, in the payment of the funeral and testamentary expenses and some of the debts of the testator.

3. The defendant made up his accounts and sent a copy thereof to the plaintiff on the day of 19 , and offered the plaintiff free access to the vouchers to verify such accounts, but the plaintiff declined to avail himself of the said offer.

No. 28.—DEFENCES TO A SUIT FOR PROBATE.

1. The said will and codicil of the deceased were not duly executed according to the provisions of the Indian Succession Act, 1865 (or of the Hindu Wills Act, 1870).

2. The deceased, at the dates when the said will and codicil respectively purport to have been executed, was not of sound mind, memory and understanding.

3. The execution of the said will and codicil was obtained by the undue influence of the plaintiff (and others acting with him whose names are at present unknown to the defendant).

4. The execution of the said will and codicil was obtained by the fraud of the plaintiff, such fraud so far as is within the defendant's present knowledge, being (*give full particulars*).

5. The deceased at the time of execution of the said will and codicil did not know and approve of the

contents thereof (or of the contents of the residuary clause in the said will, as the case may be).

6. The deceased made his true last will, dated the 1st January, 1873, and thereby appointed the defendant sole executor thereof.

The defendant claims—

- (1) that the Court will pronounce against the said will and codicil propounded by the plaintiff;
- (2) that the Court will decree probate of the will of the deceased, dated the 1st January, 1873. in solemn form of law.

No. 29.—DEFENCES TO SUITS FOR SPECIFIC PERFORMANCE.

c 1. The defendant did not agree as alleged in paragraph of the plaint or at all.

2. A. B., was not authorised by the defendant to make the alleged contract on his behalf.

3. The plaintiff has not performed the following conditions—(*state the conditions and the particulars in which they have not been performed*).

4. The plaintiff's title to the property agreed to be sold is not such as the defendant is bound to accept by reason of the following facts—(*State them*).

5. The agreement is uncertain in the following respects—(*State them*).

6. (or) The plaintiff has been guilty of delay.

7. (or) The plaintiff has been guilty of fraud (or misrepresentation. (*See p. 255*).

8. (or) The agreement is unfair. (*State how*).

9.ⁿ (or The agreement was entered into by mistake. (See pp 129 and 256).

10. The following are particulars of (6), (7), (8), (9) (or as the case may be).

11. The agreement was rescinded on (date) under Conditions of Sale, No. 11 (or by mutual agreement).

(In cases where damages are claimed and the defendant disputes his liability to damages, he must deny the agreement or the alleged breaches, or plead whatever other ground of defence he intends to rely on, e. g., the Indian Limitation Act, accord and satisfaction, release, fraud, etc.)

No. 30.—DEFENCE TO PLAINT No. 40 (p. 182).

1. The defendants do not admit that the mortgage of 20th October, 1906 was executed by Mathura Prasad and the first defendant or either of them.

2. The defendants do not admit that the said mortgage was registered by the first defendant as alleged in paragraph 2 of the plaint, or by, or with the authority of, the said Mathura Prasad.

3. The defendants will object that the purpose of defending the said Mathura Prasad, as stated in paragraph 2 of the plaint, was not a purpose of legal necessity.

4. The rate of interest charged on the said loan was excessive, and was obtained by the plaintiff by taking advantage of the momentary necessity of the said Mathura Prasad. If the Court holds that the defendants are liable for the said loan, the rate of interest ought to be reduced to a reasonable rate, and the amount claimed by the plaintiff ought to be reduced in proportion.

No. 32.—DEFENCE TO PLAINT No. 42.

1: The defendant admits the statements in paragraphs 1 to 7 of the plaint.

2. In reply to paragraph 8 of the plaint, the defendant denies that the plaintiff did not understand the effect and contents of the deed mentioned in paragraph 8 of the plaint when she executed it. The said deed was executed by her under the independent advice of (*state the names of the persons who advised the plaintiff when she executed the deed*). The said deed was registered at the Registration Office at Saharanpur with the plaintiff's knowledge and consent.

3. In reply to paragraph 9 of the plaint, the defendant will contend that the authority to adopt therein mentioned was not limited in the manner stated therein, and that, upon the true construction of the said authority to adopt, the plaintiff had authority to adopt the defendant.

4. By entering into the agreement of the 2nd January, 1898, mentioned in paragraph 6 of the plaint, and by executing the said deed of the 13th January, 1899, the plaintiff represented to the defendant, and to the defendant's father, Ram Niwas, that she had authority to adopt the defendant; and on the 13th of January, 1899 all the ceremonies proper to the adoption of the defendant were carried out by the plaintiff, and the defendant was conducted to the *Gaddi* by the defendant (*or "with her knowledge and consent"*) and was publicly installed upon it.

5. Both the defendant and the said Ram Niwas believed the representations of the plaintiff stated in paragraph 4; and in consequence of such belief they consented to the performance of the ceremony of adoption as stated in paragraph 4. In consequence of the said ceremony of adoption the defendant has now ceased

to be a member of the family of the said Ram Niwas, and has so altered his mode of life that it would now cause great hardship to him if he were compelled to return to the station in life which he occupied before his adoption ; and the defendant will contend that, in the circumstances stated in this paragraph, the plaintiff is estopped from denying that she had authority to adopt the defendant, and from questioning the validity of the ceremony of adoption performed on the 13th of January, 1899.

No. 32.—DEFENCES TO PLAINT No. 45 (p. 190).

Defence common to all the defendants except the 13th. This defendant says :

(1) He (or she) admits the facts stated in paragraphs 1, 2, 3, 5, 7, 8, 13, and 14 of the 'plaint' ; the execution and registration of the document mentioned in paragraph 4 of the plaint and that Latif, mentioned in the plaint owned the property therein mentioned ; the presentation by the plaintiff of the application mentioned in paragraph 9 of the plaint ; the fact that the said application was opposed and withdrawn as stated in paragraph 10 of the plaint ; the date of the execution and the purport of the lease stated in paragraph 11 of the plaint ; and the facts 'stated in the first sentence (ending with the word, " situated ") of paragraph 16 of the plaint. *

(2) When the said Latif executed the deed of 16th April 1909, mentioned in paragraph 4 of the plaint, he was suffering from *marazulmaut*, namely cancer of the tongue, and for more than six months before the said date he had suffered from the said disease, and when he executed the said deed he was aware that the said disease was likely to cause his death in the near future. The said disease was the direct cause of his death.

(3) The said deed was merely a device to enable the *mutawalli* for the time being of the said alleged *waqf* to distribute the income accruing from the property comprised in the said deed among the male members for the time being of the family of the said Latif; and to exclude the female members of the said family from all their rights of inheritance under Muhammadan Law.

(4) At the time when he executed the said deed, the said Latif was, by reason of his said illness, unable to understand or to conduct business; and he executed the said deed without understanding its meaning or effect.

(5) The said Latif was induced to execute the said deed by the influence of the plaintiff and of Ghafur mentioned in the plaint. By reason of the illness the said Latif, the plaintiff and the said Ghafur were in a position to dominate, and did dominate, the will of the said Latif; and the said Latif would not have executed the said deed if they had not exercised such domination over him.

Particulars.¹

(6) The said deed did not in any way restrict the power of the said Latif in deal with, or dispose of, the property comprised in it as owner; and, from the date of the said deed down to the date of his death, the said Latif did not apply any part of the said property to the purposes of the said alleged *waqf*.

(7) The plaintiff did not take possession of the said property either as *mutawalli*, or at all; and the reasons stated in paragraph 10 of the plaint were not the reasons why the application mentioned in paragraph 9 of the plaint was withdrawn.

(8) An appeal is pending from the decision in the suit mentioned in paragraph 14 of the plaint. The

¹ None were given in the defence which was filed.

decision in the said suit, that the said alleged *wagf* was valid and enforceable, was unnecessary for the purposes of the said suit.

(9) The plaintiff has neither held nor managed the property numbered 22 and 23 in Schedule A of the plaint as *wagf* property.

(10) The plaintiff has not been placing the profits of the property enumerated in schedule B of the plaint in the treasury of, or applying it to objects of, the said alleged *wagf* as alleged in paragraph 16 of the plaint.

(11) The amount shown in schedule C of the plaint as *meane* profits is in excess of the profits of the property included in the said schedule.

The 6th, 7th, and 8th defendants in addition to pleading as above each pleaded as follows :—

In reply to the statement in the last sentence of paragraph 13 of the plaint, this defendant still claims her share of the property in suit as an heir of the said Latif.

All the defendants except the 10th and 13th admitted the facts stated in the first sentence of paragraph 4 of the plaint.

Pleas by the 13th defendant :—

This defendant says

(1) She admits the facts stated in paragraphs 1, 2 and 3 of the plaint.

(2) She does not claim any share in the property of Latif, mentioned in the plaint, as his heir, nor is she in possession of any such property.

(3) She does not admit the facts stated in the first sentence of paragraph 4 of the plaint. The properties numbered 1 to 19 in schedule A of the plaint were owned in equal shares by Aziz, mentioned in paragraph 1 of the plaint, and by the said Latif. When the said Aziz died this defendant was two months' old ; and the 10th defendant shortly afterwards married the said Latif. The said Latif held and managed, as a trustee for this defendant, her share in the property of the said Aziz as heir of the said Aziz ; and the said Latif was not entitled to include in the property of the said alleged *wagf* this defendant's said share.

(4) Even if the said Latif was not a trustee for this defendant of her said share, this defendant did not reach full age till the 28th May 1915 ; and she has instituted a suit No. of in this court against the plaintiff and defendant Nos. 1 to 12 to recover her said share.

(5) In reply to paragraph 11 of the plaint ; this defendant has never disputed nor does she now dispute the *wagf* alleged in paragraph 4 of the plaint. She has never been put in possession of any property under the lease mentioned in paragraph 11 of the plaint ; but she is ready to accept possession of her share under the said lease, except in so far as the said lease may include property which belonged to her father, the said Aziz, and which she claims as stated in paragraphs 3 and 4.¹

1 No plea of this kind was put in by the young lady in the actual case. She, quite unnecessarily, denied the validity of the *wagf*, and by doing so forfeited her interest under the lease. The tenth defendant was in a different position. Her interest under the lease may not have been as valuable as her share as heir of Latif, and so it may have been better for her to dispute the *wagf*.

No. 33.—DEFENCE TO PLAINT No. 46 (p. 194).

The dower of the first plaintiff was not a deferred dower of one lac of rupees or of any other sum. It was a prompt Fatimai dower of rupees 65-4-0 and was paid to her at the time of her marriage to I. Y. Khan.

Defence to paragraph 4 by the fourth defendant :—

This defendant is the owner of the property described in schedule B of the plaint, and the said property was not the property of the said I. Y. Khan at the time of his death. The value of the said property is not more than Rs. 2,000.

No. 34.—DEFENCE OF A CUSTOM.

By the custom of the said village, if the Zamindar of it gives a tenant of land within the *abadi* permission to build a residential house within the *abadi*, the tenant may sell the site of the house along with the house itself.

ANOTHER PLEA.

It has been the immemorial custom and ancient usage in Muhammedan families in the district of Coimbatore in general, and in the families of these defendants and of their relations in particular, to follow the Hindu Law as regards the law of property, succession and partition. Only male members are entitled to succeed to the properties of their relatives, and females are excluded from inheritance, when there are males. It is also part of the said custom in such Muhammedan families to give some money or property at the time of, or immediately after, her marriage to a female member in lieu of the share to which she would be entitled as heir, if the Muhammedan Law of Inheritance were

applicable ; and in fulfilment of this custom the defendant's father gave jewels, cash and other moveable property worth about Rs. 4,000, to the mother of the plaintiff, immediately after her marriage. The property so given was .. *(set out the property e. g. " Rs. 2,000 in cash, an emerald jewel worth Rs. 1,000 a diamond ring worth Rs. 5,000 and 2 sahris worth Rs 500 " or say, Particulars of the said property are set out in the Schedule hereto, and add a schedule.)*

No. 35.—DEFENCE IN PRE-EMPTION SUITS.¹

Pleas by defendant (*buyer*).

1 The defendant denies that the entry in the *wajib-ul-arz* mentioned in paragraph 4 of the plaint amounts to a recognition of a right of pre-emption in the mahal mentioned in paragraph 1 of the plaint

or

The suit mentioned in paragraph 4 of the plaint was not contested.

2. On (*date*) A. B. (*the seller*) at (*place*) sent by registered post a notice to the plaintiff, describing the property intended to be sold by the said A. B., and stating the price and that the defendant was the buyer. The said notice was delivered to the plaintiff on (*date*), and the plaintiff did not, within a month after receipt of the said notice, send any notice by registered post of his intention to buy the said property.

3. The plaintiff has not brought this suit for his own benefit but is suing *bendami* on behalf of (*state name*).

4. Since the date of the sale mentioned in paragraph of the plaint the plaintiff has ceased to be

¹ See p. 195.

a co-sharer in the mahal mentioned in paragraph of the plaint. *(State how the plaintiff has lost or parted with his interest).*

5. The plaintiff's claim does not include all the lands transferred to the defendant, which, on the facts alleged by the plaintiff, he would be entitled to pre-empt, *(describe the lands which the plaintiff has not claimed).*

Plea by the seller if he has been made a defendant.

The defendant says that he is not a necessary party to the suit and asks that his name be removed from the record.

ANSWERS TO PETITIONS IN MATRIMONIAL SUITS,¹

No. 1.—RESPONDENT'S ANSWER TO PETITION No. 1.

In the Court of the day of

Between A. B., petitioner,
C. B. respondent, and
X. Y., co-respondent.

C. B., the respondent, by D. E., her attorney (or Vakil), in answer to the petition of A. B., says that she denies that she has on diverse or any occasions committed adultery with X. Y. as alleged in the third paragraph of the said petition.

Wherefore the respondent prays that this (Hon'ble) Court will reject the said petition.

(Signed) C. B.

¹See pp. 198—210.

4. That the petitioner condoned the said adultery with G. H., if any.

Wherefore this respondent prays that this (Hon'ble) Court reject the prayer of the said petition.

(Signed) A. B.

No. 4.—REPLY TO ANSWER No. 3.

In the (High) Court of

B. against B.

The day of

The petitioner, C. B., by her attorney (or Vakil),
says—

1. That she denies that she condoned the adultery of the respondent with E. F., as in the second paragraph of the answer alleged.

2. That, even if she condoned the said adultery with E. F., the same has been revived by the subsequent adultery of the respondent with G. H., as set forth in paragraph 4 of the petition.

3. That she denies that she condoned the adultery of the respondent G. H., as in fourth paragraph of the answer alleged.

(Signed) C. B.

No. 5.—ANSWER TO PETITION No. 5.

In the (High) Court of

The day of

Between A.B., petitioner, and
C. B., respondent.

C. B., the respondent, in answer to the petition filed in this cause, by W. J., his attorney (or Vakil), saith that he denies that he has been guilty of cruelty towards the said A. B., as alleged in the said petition.

(Signed) C. B.

APPENDIX I.

"HOW TO PREPARE YOUR CASE" (a)

— — —

I propose in this address to lay down a few simple rules on what I conceive to be right method of preparation for contesting a case in court.

The art of advocacy consists in presenting what you allege to be the facts and the law of your case in so clear and agreeable a fashion, as to prepossess your audience from the outset and take their minds with you, step by step, to your ultimate conclusion. Whether they agree with you or not, they will then be left in no doubt as to the road along which you wish them to travel : they will appreciate the logical sequence of your story, and the relation which, as you contend, the various facts bear to each other. To do this, you must work on some system, and you must at the outset of your career, choose for yourself some general plan, and then improve it in detail, as you increase in experience, until it exactly suits your individual requirements.

The first thing that is essential for clear argument is, that you should know your own case thoroughly, and have formed as accurate an estimate of your opponent's position as is possible from the documents before you. This requires two things—diligence and thought. You must get every fact clearly into your mind, and then you must think them over quietly by yourself. To argue a case effectively, you must, as I once heard Lord Moulton say, "play chess with it." That is, you must consider how many and what kind of pieces you have got on the board, guess as nearly as possible how many

(a) This address was delivered by Sir Grimwood Mears in the University School of Law on January 19th, 1920.

your opponent has, and see how you can move yours, to the best advantage, both for purposes of attack and defence.

Some advocates come into court trusting entirely to a naturally good memory, reinforced by a few pencil marks scattered here and there amongst disordered papers. They have no notes at all; they have not forecasted the probable course of the case, and they have given to it nothing that can be called thought. They assume that as soon as they have got a general idea of the matter to be debated, they can fight it adequately. Never was there a greater mistake; and men who do their work like this are usually failures throughout their life. The arts of the actor, of the advocate, and of the public speaker are not unlike. What actor would dare to come on the boards content with being merely "word-perfect" in his part? He rehearses and rehearses, until he thinks that he has reached the point when he can make the effect on which his success in his profession depends. The principle is the same so far as you are concerned. Every case you conduct will either increase or diminish your reputation, and work well done by advocates benefits them as well as their clients and the administration of justice in the country. Work badly done brings the courts into disrepute, injures the client and discredits the practitioner.

Let me, by way of illustration, tell you a story of a man who started life in Great Britain with no greater advantages than you or I, yet who by untiring industry, singleness of aim, and fierce enthusiasm has lived to put us all under a burden of personal obligation impossible for us to repay. I refer to Mr. Lloyd George. I am not of course going to talk politics to you, for the simple reason that I know nothing about them, except this, that they demand by way of apprenticeship, a more arduous and sustained course of study and thought.

than the stiffest honours examination of any university. They require an intimate knowledge of past and present systems of government, a complete understanding of the social and economic conditions of your own and other countries, and, finally, both coolness and maturity of judgment. Politics are an appropriate career for men of wealth and position who are prepared to devote their lives to political science and the art of government, and who have money enough to be free from all financial cares ; but, for the young professional man who has to earn his living, politics, when he has got them badly, are as disastrous as drugs. At the same time it is the clear duty of every man to follow with interest the political affairs of his own and other countries, but he should remember that his profession or business is his main pursuit in life, and that, if he permits himself to become absorbed in politics, his work is quite certain to suffer.

Now, to come back to my story, it so happened that, in the early part of 1917, I had occasion to go one Sunday to the Prime Minister's house at Walton Heath. Our business occupied a few minutes only, and then, having discussed one or two aspects of the war, he said, " Would you like to know what I think of the present position ? " You can guess my answer. Thereupon he got up from his chair and walked up and down the room, commencing what I recognised at once as the ground-work of a forthcoming great public speech. In it he compared Germany to a savage wounded animal rushing out from its lair first in one and then in the other direction, scratching and mauling those surrounding it—then going back out of sight and gathering strength for its next onset. He was referring, of course, to the alternating attacks on the two fronts with intervening periods of recuperation, when the German lines were thinly held and reliance put upon skeleton

battalions, machine guns and barbed wire. At the end of about 25 minutes, when the Prime Minister was evidently not one third of his way through his subject, a car passed beneath the window—a friend came in; the spell was broken, and the speech unfinished.

Now, does it not occur to you that if a practised and naturally great orator like Mr. Lloyd George, with all his experience and marvellous memory, finds it necessary to rehearse what he is going to say, that you might find it worth while too? He wanted to clear his mind, to hear how his sentences sounded, and he wished to be sure that what he said was accurate, consecutive and well-reasoned. He was just marking out his course. If, therefore, you get up to open a case without adequate preliminary preparation and without arming yourself with a chart by which you are going to steer, the first question from the judge, who may reasonably want enlightenment on some point, is very likely to throw you out of your stride. You may have difficulty in resuming your speech, or your examination, at the exact point at which you broke off—you may omit some material fact, and its absence in your speech may render your story unintelligible, or its omission from your evidence may cost you your case.

I regret to say that, even in the High Court here there is a small percentage of men who open cases in the middle of the story, instead of at the beginning, because they have not worked up their case properly or given their minds seriously to it. On the other hand, I am glad to say that the majority of the cases are argued admirably, with issues carefully defined, with every date and relevant circumstance narrated in its proper place and in its proper setting, and emphasised according to its particular importance. Irrelevant and third rate points are thrown over without hesitation, and

authorities, if cited at all, are chosen with care. As you listen to one of these men it all seems easy; but I know that a lucid opening and a proper compression of the story means hours, "perhaps days, of careful preparation. I believe that a great deal of clumsy advocacy is due, not to want of ability, but to want of method, and to a failure to realise that the way to win a case is by hard work before ever that case is called on in court.

Now, if you have followed me thus far, you will naturally want to know how you can do this preliminary work to the best advantage so as to give yourself the best chance of success. Well, I will now give you an outline of a system which if not the best that can be devised, is at least good enough for you to try.

Get first of all a nodding acquaintance with your facts—sufficient to enable you to arrange your documents in their proper order. Then, if your papers are not bound together, number each one boldly in the right hand top corner, and then, having turned it over, put the same number in the extreme left hand top corner. In this way, wherever it is lying on the desk, you will be certain to find it quickly.

Next, take separate sheets of manuscript paper, and put first the names of the parties, other than those of merely formal plaintiffs or defendants, and underline the name of the party for whom you appear.

Then put an index of the documents, and the names of your witnesses underneath.

After that, state in the fewest possible words the issues in the case. Then divide your page up into four columns, headed respectively 'Date,' 'Facts to be proved,' 'How and by whom,' 'Reference.' In the second of those four columns, you put every fact which

bears^o upon the enquiry, and should underline those which are the foundation of your action, and which it is absolutely essential for you to prove. Facts very much in your favour may be underlined in blue, and those against you in red. If you are calling a witness to prove, say the due execution of a mortgage, that will appear in its proper place in the columns, and, in such a case, it is not a bad plan to jot down the essentials of the section against the witnesses' name. Although you may know the provisions of the section by heart, your attention may be momentarily diverted, and you may miss one, and your opponent, if discreet, will ask no questions of your witness, but will get him out of the box as quickly as possible, and so your case, otherwise unanswerable, may break down on a technical point.

For a reason which will appear³ later,² be particularly careful to see that you have got each fact in its proper place. When you are satisfied as to this, take as your next heading "Law," and put in very carefully chosen language, the exact proposition which you have to establish, or to rebut. In many cases the law will be so elementary that this will not be necessary; but when you anticipate an argument, draft the statement of the law in your own words, and then consult your books. If you decide that it is necessary to cite authorities, make a note of them, and of the particular passages to which you^o wish to refer. Don't assume that every case involves the necessity of bringing authorities into court; and, above everything, don't begin to wave books about until all the facts have been put before the judge, though at times it is, of course, proper to indicate briefly in your opening what your legal contention will be, if you succeeded in establishing the facts on which you rely.

If you are appearing for the plaintiff, your notes, so

far as they have gone will contain the whole of his positive case. •

Now consider how you can deal with the defendant and his witnesses. Your papers will probably give you some indication of the line which your opponent is going to adopt. Spend some time thinking over the crucial questions which you want to ask him and his witnesses, and cut those questions down as much as you can. Put them down in as abbreviated a form as possible; but don't be a slave to them, as cases frequently run away on unexpected lines, and points, previously unseen, or of apparently minor importance, come into prominence. Therefore, leave space for a word or two to be put in during the course of the trial, to guide you as to other questions which may become essential.

And now let me give you a word of caution. Cross-examination is a most difficult and subtle art. Everyone thinks, when he is very young, that he is a born cross-examiner, and the younger he is, the more certain he is of it. Not once, but a dozen times, have I seen good cases thrown away by reckless cross-examination. Sometimes dangerous questions have been asked and convincingly destructive answers given. At other times counsel splashes about with no definite idea of any plan of attack, and succeeds in filling up, to his own detriment, some gap in the evidence which his adversary had left open, either from carelessness or because the witness in his examination-in-chief was nervous, or forgetful, or did not come up to his proof.

A roving cross-examination is the most hazardous of adventures. You nearly always strike rocks. Therefore fix firmly in your mind just what you think you can get out of each particular witness called by your adversary, and be careful not to travel outside the bounds you set for yourself. Don't imagine that the judge will set you

down as incompetent, if you let a witness go without asking him anything. Leave him alone, if he has said nothing which injures your case, and you have no reason to believe that you can squeeze something out of him in your favour. The judge, instead of disapproving, will recognize that you are an advocate of tact and discretion far above the average.

Finally, add to your list any authorities on which you think that your opponent is likely to rely, and note down, if you can, authorities for his discomfiture.

You will now have reached the final state of preparation, and, if you turn back to the first page and go through your notes, you will see arranged in their proper order all the materials for a clear and effective opening. You have the parties, the issues, the facts in their proper order, and the law, all in a nutshell. Then, with your notes in your hand, just rehearse quietly to yourself what you propose to say to the judge. It is astonishing how this will fix the points in your mind. If you do this, you will feel comfortable and confident, however tangled and complicated the matter may be—no matter to whom you are opposed. One other result will be that, when you are in court, you will not have to grope about in a mass of papers to find some particular date or minor fact. Throughout the hearing you will be able to give every reference to any particular fact in a moment, and this thorough preparedness will give you more time to watch the progress and shifting of the case. Nothing is truer of advocacy than that preparation is power, and a diligent second rate man will, time and again, win victories over a brilliant but less industrious adversary. °

When you have finished the case, put a number on your notes and the date, and file them. Keep a book with the letters of the alphabet cut in the right hand,

side of the leaves, and put in it the barest abstract of any point of law that you have had to look up. Thus, suppose you have in a few years' time a case on a mortgage, you turn to M and you see mortgage—"priority" 2, 23, "contribution" 7, 46, "due execution" 103. If you got up the cases numbered 2 and 23 carefully in days gone by, you will find in your old notes all the law as to priorities up to the date when you fought those cases. Then look up the recent decisions I say you will find all the law; because of course you will take a note of the authorities cited against you; but follow these up, in order to be sure that your opponent did not omit any when he was arguing against you. In that way you can save yourself endless work, because points of the same sort frequently recur.

All this means hard work, but hard work, properly directed, means good work. There is also another view of it. If you take a man's money, it is only common honesty to deliver sixteen ounces to the pound. In this way, and in this way alone, you will be true to your client, true to yourself and true to your profession, and able to live on good terms with your conscience. It is an unpleasant thing to come out of court with the feeling that, if you had known your case a little better, you might have won it.

There is a wider aspect of this matter, which was brought to my attention in a very striking way. On the 5th April of last year, that is to say about nine months ago, I was a guest at a dinner given to that illustrious ambassador and great Chief Justice, Lord Reading. We were the guests of the Bar Association of the State of New York, and the magnificent banquetting room of the Waldorf Astoria was crowded with Officers of State, Judges, Senators and Congressmen. In all, I suppose, we numbered 600. Whilst we were

waiting to go in to dinner I was talking to one of the Judges of the State of New York, and he was speaking of that wonderful fact that half the world owes its safety and security to the ancient Common Law of England, Americans are proud of the fact that they have with Great Britain the same heritage of language, law and literature. He told me with what pleasure he read the English reports as soon as they reached America ; and then he said, " You know I often turn to the English law portion of the Indian reports and get great help from them."—I was particularly interested to hear this, because at that time India was in my thoughts too, but of that fact he could have known nothing.—He continued, " I had a case a week or two ago, which worried me very much. Nothing in any of the American reports seemed in point ; the English ones were not much more helpful, and then I thought I would just see if India would lift me over the stile."

Then he told me the facts of the case, which were as follows :—

It was a claim by the plaintiffs, who were the charterers of the defendant's ship, for damage to their cargo. The damage was said to have arisen from improper loading and insufficient dunnage—that is, as you know, bags, matting and " cargo protection " generally. There was in the charter party an unusual clause which gave to the charterers the right to nominate the stevedores under whom the loading was to be carried out, but they were to be paid by the shipowners. The charter party provided that the shipowners should be responsible for loss or damage caused by insufficient or improper packing, but the bill of lading contained a special exception which appeared to exempt them from liability for damage under this head.

Having told me this much, he said, " I took all the evidence and reserved judgment. I felt pretty certain

that the clause in the charter party governed the rights of the parties, and that the charterers' right to nominate the stevedores did not make the latter any the less the agents of the shipowners. I had reached that stage when I thought I would look into the Indian Reports, and within an hour I found in our library the very thing I wanted. The decision was extraordinarily in point. One judge tried it, and then on appeal it went before two others, and all three judgments were admirable. I felt quite safe in following them. I gave judgment a day or two ago, and my decision will be one of the leading American authorities on the point that where a charter party and bills of lading are in conflict, the charter party is the governing instrument."

Naturally I was much impressed by this, and when I got back to Washington I went to the Bar Library at the Capitol, and there I found in 41, Indian Law Reports (Bombay Series) at page 119, the very case which had been such a godsend to my friend, and had played its part in building up the commercial law of America.

Is it not interesting to think that the voices of the Indian Judges who decided that case, Mr. Justice Beaman, Mr Justice Heaton and Sir Basil Scott, should echo right across the world. and that the decision of the Bombay High Court should be received with appreciation and used to solve the problems of litigants of another nation, linked to this Empire by no other tie than that of friendship? Our work therefore, whether as judges or counsel, is not merely ephemeral,—born today and dead tomorrow. The argument and decision of cases gives light to our contemporaries, and binds posterity as well. Let us all therefore, at all times, give to our work the best that is in us.

APPENDIX II.

A NOTE ON DOMICIL.¹

The late Professor Dicey in his well-known "Digest of the Laws of England with reference to the Conflict of Laws" described domicile thus :—

"The domicile of a person is, in general, the place or country which is in fact his permanent home; but is in some cases the place or country which whether it be in fact his home or not, is determined to be his home by a rule of law." The latter part of this description refers, amongst others, to cases in which a man, having acquired a domicile, abandons it without acquiring a new one, in which case his domicile will be his domicile of origin, i. e., the domicile which his father had at the time of his birth. The meaning of the expression "permanent home," is important in this connection. Professor Dicey defined it thus :—"A person's home is in that place or country in which he in fact resides with the intention of residence (*animus manendi*) or (ii) in which having so resided, he continues to reside, though no longer retaining the intention of residence (*animus manendi*) or (iii) with regard to which, having so resided there, he retains the intention of residence (*animus manendi*), though he in fact no longer resides there." This *animus manendi* will exist in two cases, (a), where a man has settled in a country with the intention of spending the rest of his life there, and, (b), where having come to a country with the intention of earning a living and saving enough to enable him ultimately to leave the country and to settle elsewhere, his circumstances are such that, though he may have a vague hope that by some stroke of good fortune he may be able to leave the country, yet he can have no real

¹ See pp. 127 and 128.

intention, based on rational expectation, of spending the end of his days elsewhere.

The following illustrations of cases which are the most likely to come before courts in British India in the exercise of jurisdiction in divorce explain the rules :—

(i) *A*, whose domicil of origin is British India, has always lived there ; he is domiciled in British India and will continue to be domiciled there until he has actually left the country with the intention of no longer having his permanent home or fixed habitation there: see the Indian Succession Act, s. 10, illustrations (f) and (g).

(ii) *A* comes to British India in Government or any other service, and intends to leave as soon as his period of service is over. *A* is not domiciled in British India; but, if he changes his mind, and forms the intention of settling permanently in British India after his period of service expires, he will, from the moment when he forms that intention, be domiciled in British India. It may not be easy to prove the intention ; but if it is proved, the conditions are fulfilled ; see the Indian Succession Act, s. 10, illustrations (c), (d), and (e).

(iii) *A* settles in British India as a merchant, intending to spend his life there : he travels from time to time, stays in other countries, and could live elsewhere if he wished. His domicil is British India : see the Indian Succession Act, s. 10, illustration (a)

(iv) *A* in the last illustration, having acquired a domicil in British India, makes up his mind to leave the country for good. He will continue to be domiciled there until he actually leaves the country.

(v) *A* lives and carries on a trade, or practises a profession, in British India. His circumstances are such that he could settle down elsewhere, or is likely to be able to do so within a reasonable time. He does not intend, and never intended, to spend the rest of his life

there? though he has not made up his mind when he will leave the country. A is not (it would seem) domiciled in British India (a).

(vi) A, in the last illustration, never wanted to spend all his life in British India, he would like to leave the country if he could ; but he cannot do so, and it is unlikely that he will ever be able to do so, without making sacrifices which no rational man would make. A is domiciled in British India, because he can have no real intention of leaving it.

A few words may be added by way of explanation. Two things are necessary for the acquisition of a domicile: the fact of residence and the intention to reside permanently ; and, once a domicile has been acquired, it can only be lost by both abandoning the residence and changing the intention. What a man does or says, may be excellent evidence of his intention, but it is no more than evidence. A court must come to a definite conclusion upon the question of intention before it can determine whether a domicile has been acquired or abandoned. Part II of the Indian Succession Act contains the accepted rules, except in two matters. S. 13 is contrary to the opinion of Dicey founded on English decisions (Conflict of Laws, 2nd ed., p. 123,) but the question is unlikely to arise in divorce proceedings. S. 11 enacts that a person who has been resident in British India for more than a year can acquire a domicile there by depositing in an office appointed by the Local Government a declaration of his desire to do so. As far as inheritance of property is concerned, the section is consistent with the principle of the Domicile Act, which was passed by the Imperial Parliament in 1861, and which only deals with succession to personal

e(a). In an actual case of this kind, a great many factors have to be taken into account.

property ; and, in any case, it is for the Indian Legislature to decide how it will deal with inheritance *ab intestato* in India. That is a purely domestic matter. But the Succession Act is not concerned with divorce jurisdiction, and, in divorce proceedings, the parties ought to consider two questions, has the court got jurisdiction, and will the courts of other countries recognise that jurisdiction. A declaration of a desire to acquire a domicile in British India would, in any court outside this country, be no more than evidence of an intention to acquire such a domicile, so that a divorce granted in British India would not necessarily be valid elsewhere merely because, before the case was heard, the husband had made a declaration under s. 11 of the Indian Succession Act.

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